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Supreme Court, U.S.
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No. 03-

In the
Supreme Court of the United States

CITY OF MCALESTER, ET AL.,
Petitioners,

v.

PITTSBURGH COUNTY RURAL
WATER DISTRICT NO. 7, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Tenth Circuit's rejection of the issue preclusive effect of final "deannexation orders" entered by a state administrative body, and subsequent state-court appellate orders, was error under *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991), and similar decisions recognizing the issue-preclusive effect of final state administrative decisions.

PARTIES TO THE PROCEEDING

Petitioners

Your Petitioners are the City of McAlester and the McAlester Public Works Authority. The City of McAlester is a governmental entity. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Generally speaking, singular references to "McAlester" are intended to encompass both Petitioners. The Petitioners are Defendants in the underlying District Court action, and are Appellees in the underlying Tenth Circuit appellate action.

Respondents

The principal Respondent in this action is Pittsburg County Rural Water District No. 7, referenced herein as "Pitt-7." Pitt-7 is the Plaintiff in the underlying District Court action, and is the Appellant in the underlying Tenth Circuit appellate action.

In addition to Pitt-7, the following additional parties should be considered as Respondents pursuant to Supreme Court Rule 12(6): (1) Kenneth W. Sherrill, (2) Linda F. Sherrill, (3) MIG, Inc., (4) Pittsburg County Regional Exposition Authority, (5) Pliant Corporation, successor to Huntsman Edison Films Corporation, successor to Blessing Corp., d/b/a Edison Plastics, (6) Tri-Cat, Inc., (7) Dennis DeFrange, (8) Terry Kinyon, (9) Bar-19, (10) Southeast Oklahoma Box Company, (11) Simmons Poultry Farms, Inc., (12) Pittsburg County Board of Commissioners, (13) Oben Weeks, (14) H.G. Gilliam, (15) Bill Webber, and (16) Thundercreek Golf Course Authority. These additional parties are "Additional Defendants" in the underlying District

Court action, and are Appellees in the underlying Tenth Circuit appellate action.

At the time of relevant events, Mr. Weeks, Mr. Gilliam, and Mr. Webber were members of the Pittsburg County Board of Commissioners, which is the state administrative body that was asked to enter certain orders regarding the District's state-law geographical boundaries. These additional parties will be referenced herein as "the Commissioners" or "the Board of Commissioners."

The other additional parties listed above are landowners who joined in certain deannexation proceedings before the Board of Commissioners. These additional parties will be referenced herein as "the Landowners." Generally speaking, references to "the Landowners" should be taken to include the City of McAlester. The City of McAlester is itself a landowner and, in that capacity, joined in the deannexation proceedings before the Board of Commissioners. As noted above, the City of McAlester is a Petitioner here. To the extent it is necessary to make such a distinction, the term "non-Petitioner Landowners" may be used to describe the Landowners exclusive of the City of McAlester.

The Petitioners anticipate that the Commissioners and the non-Petitioner Landowners will support the position of the Petitioners, for purposes of Supreme Court Rule 12(6).

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OPINIONS BELOW

Opinions, orders, and judgments underlying the current appeal. The underlying litigation was initiated in the U.S. District Court for the Eastern District of Oklahoma. The District Court entered an Order on June 7, 2002, granting McAlester's motion for partial summary judgment and holding that the Order "disposes of the case in its entirety." The District Court then entered its Judgment on June 12, 2002. The June 7, 2002 Order and June 12, 2002 Judgment are unpublished. The June 7, 2002 Order is included in Appendix D, at page 94a. The June 12, 2002 Judgment is included in Appendix E, at page 109a.

Pitt-7 initiated an appeal from the June 7, 2002 Order and June 12, 2002 Judgment. In that appeal, the U.S. Court of Appeals for the Tenth Circuit entered its Opinion on October 17, 2003, affirming in part and reversing in part the District Court's June 7, 2002 Order and June 12, 2002 Judgment. The October 17, 2002 Opinion was published as *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 346 F.3d 1260 (10th Cir. 2003), and is included in Appendix C, at page 49a.

On February 6, 2004, the Tenth Circuit entered its Order denying the parties' petitions for rehearing and rehearing en banc, "except with regard to [an] 'internal inconsistency.'" The February 6, 2004 Order is unpublished, but is included in Appendix A, at page 1a.

The February 6, 2004 Order clarified the October 17, 2002 Opinion and directed that an amended opinion be filed and published. The Amended Opinion was filed on February 6, 2004. The February 6, 2004 Amended Opinion is published as *Pittsburg County Rural Water District No. 7 v.*

City of McAlester, 358 F.3d 694 (10th Cir. 2004), and is included in Appendix B, at page 4a.

The state administrative proceedings and related state-court appeal. In this Petition for Writ of Certiorari, McAlester demonstrates that the Tenth Circuit invalidated judgments entered by state courts and a state administrative body - the Board of Commissioners. For this reason, the judgments and orders entered by the state courts and state administrative body are relevant for purposes of Supreme Court Rule 12(1)(i)(ii), and are included in the Appendix to this Petition for Writ of Certiorari.

On June 27, 1997, the Board of Commissioners entered a Certificate Releasing Lands from Rural Water District No. 7, Pittsburg County, Oklahoma. The June 27, 1997 Certificate addressed land owned by the Pittsburg County Regional Exposition Authority, which is a Respondent here, an Appellee before the Tenth Circuit, and an "Additional Defendant" before the District Court. The June 27, 1997 Certificate is included in Appendix G, at page 152a.

On July 7, 1997, the Board of Commissioners entered another Certificate Releasing Lands from Rural Water District No. 7, Pittsburg County, Oklahoma. The July 7, 1997 Certificate addressed land owned by certain other Landowners, each of which is either a Petitioner or Respondent here, an Appellee before the Tenth Circuit, and an "Additional Defendant" before the District Court. The July 7, 1997 Certificate is included in Appendix G, at page 149a.

Pitt-7 filed an appeal from the June 27, 1997 and July 7, 1997 Certificates. The appeal was filed by the District Court of Pittsburg County, State of Oklahoma. On September 15, 1997, the District Court of Pittsburg County entered an Order dismissing Pitt-7's appeal from the June 27, 1997 and July 7, 1997 Certificates. The September 15, 1997 Order is included in Appendix G, at page 146a. As shown below, the September 15, 1997 Order was eventually affirmed, with all appellate relief exhausted.

Pitt-7 filed an appeal from the September 15, 1997 Order. The appeal was filed with the Supreme Court of Oklahoma, which referred the appeal to the Oklahoma Court of Civil Appeals. On May 19, 1998, the Oklahoma Court of Civil Appeals entered its Memorandum Opinion, affirming in part and reversing in part the September 15, 1997 Order. The May 19, 1998 Memorandum Opinion is included in Appendix G, at page 138a.

McAlester filed a Petition for Rehearing, seeking clarification of certain points contained in the May 19, 1998 Memorandum Opinion. On August 17, 1998, the Oklahoma Court of Civil Appeals granted rehearing. The August 17, 1998 Order, granting rehearing, is included in Appendix G, at page 136a.

On September 8, 1998, the Oklahoma Court of Civil Appeals entered its Opinion on Rehearing, affirming the September 15, 1997 Order. The September 8, 1998 Opinion on Rehearing is included in Appendix G, at page 131a.

Pitt-7 filed a Petition for Rehearing, seeking to set aside the September 8, 1998 Opinion on Rehearing. On October 13, 1998, the Oklahoma Court of Civil Appeals entered an Order denying Pitt-7's Petition for Rehearing. The October 13, 1998 Order is included in Appendix G, at page 129a.

Pitt-7 filed a Petition for Writ of Certiorari with the Oklahoma Supreme Court, seeking to set aside the September 8, 1998 Opinion on Rehearing. On January 21, 1999, the Oklahoma Supreme Court entered an Order denying certiorari. The January 21, 1999 Order is included in Appendix G, at page 128a.

Pitt-7 did not seek further appellate review of these orders and judgments entered by the state courts and state administrative body.

The prior appeal. This litigation was the subject of a prior appeal, occurring before the entry of the June 7, 2002 Order and June 12, 2002 Judgment. The federal-court orders and judgments occurring prior to June 7, 2002 are not "entered in conjunction with the judgment sought to be reviewed," for purposes of Supreme Court Rule 14(1)(i)(i), and, therefore, are not included in the Appendix to this Petition for Writ of Certiorari.

The prior Orders and Judgment of the U.S. District Court for the Eastern District of Oklahoma were unpublished, although the District Court's November 26, 1997 Order is reported on Westlaw at 1997 WL 835210. The District Court Orders and Judgment were included in the Appendix to a Petition for Writ of Certiorari filed by McAlester in U.S. Case No. 00-323, and can be found online, in portable document format (pdf), at 2000 WL 33999313.

The Tenth Circuit's prior Order and Judgment are reported in a table at 211 F.3d 1279, and on Westlaw at 2000 WL 525942. The Tenth Circuit's prior Order and Judgment, and its order denying rehearing, were included in the Appendix to a Petition for Writ of Certiorari filed by

McAlester in U.S. Case No. 00-323, and can be found online, in portable document format (pdf), at 2000 WL 33999313.

On November 27, 2000, the U.S. Supreme Court denied McAlester's prior Petition for Writ of Certiorari, filed in U.S. Case No. 00-323. *City of McAlester v. Pittsburg County Rural Water District No. 7*, 531 U.S. 1011 (2000). Similarly, on November 27, 2000, the U.S. Supreme Court denied Pitt-7's Petition for Writ of Certiorari, filed in U.S. Case No. 00-490. *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 531 U.S. 1011 (2000).

JURISDICTION

The Tenth Circuit entered its Order and Judgment on October 17, 2002. [Appendix C.] On October 31, 2002, the Petitioners filed a timely Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). On February 6, 2004, the Tenth Circuit entered its Order denying all parties' petitions for rehearing and rehearing en banc, "except with regard to [an] 'internal inconsistency.'" [Appendix A.] The February 6, 2004 Order clarified the October 17, 2002 Opinion and directed that an amended opinion be filed and published. The Amended Opinion was filed on February 6, 2004. [Appendix B.] This Petition for Writ of Certiorari is filed within 90 days of the Tenth Circuit's February 6, 2004 Order on rehearing and its February 6, 2004 amended opinion. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 1

The Spending Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* *

7 U.S.C. § 1926. Water and waste facility loans and grants.[1]

...

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

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[1] The full text of 7 U.S.C. § 1926(b) is set forth in Appendix F.

Okla. Stat. tit. 82, § 1324.3

Purpose of Districts - Organization.

Public nonprofit rural water districts, public nonprofit rural sewer districts, public nonprofit natural gas distribution districts and public nonprofit rural solid waste management districts may be organized under this act for the purpose of developing and providing an adequate rural water supply, gas distribution facilities, sewage disposal facilities and solid waste management system to serve and meet the needs of rural residents within the territory of the district. The board of county commissioners of each county in this state shall have the power and it shall be their duty, upon a proper petition being presented, to incorporate and order the creation of rural water, sewer, gas and solid waste management districts in the manner hereinafter provided.

* *

Okla. Stat. tit. 82, § 1324.5

Notice of Filing and Pendency of Petition - Public Hearing - Notice of Hearing.

Whenever a petition as provided in the preceding section is filed with the county clerk, he shall thereupon give notice to the county commissioners of the filing and pendency of said petition, whereupon, if the petition proposes the creation of a water district, the county commissioners shall immediately determine from the Oklahoma Water Resources Board whether or not there is water available to adequately serve the proposed district, and the county commissioners shall forthwith enter their order setting a public hearing upon said petition for a day certain and directing the county clerk to give notice of said hearing by legal publication for two (2) consecutive weeks in a newspaper published in each county containing lands embraced within the boundaries of the proposed district. Said newspapers must have a general circulation in the county of publication. Provided, however, if there is a county in which there is no newspaper of general circulation published, notice of such hearing shall be given by posting in five public places within said county, one of which shall be the county courthouse. Such notice shall contain: a brief and concise statement describing the purpose of such hearing; a description of the territory to be embraced within said district; a notice to all persons residing or owning property and incorporated municipalities within the proposed district that they may appear upon the date and at the time and place of said hearing to show cause, if any there be, why said petition should not be granted; and a notice to all rural residents of the proposed district that, if said district shall be ordered created, an organizational meeting to elect a board of directors and officers and to adopt bylaws will be held immediately following the entry of the order creating said district. In addition, the county clerk shall, at least ten (10) days before the date fixed for said hearing, give or send by registered or certified mail notice thereof to each of the petitioners.

* *

Okla. Stat. tit. 82, § 1324.21

Release of Lands from District - Petition - Notice.

In the event that landowners within a district desire to withdraw from such district, fifty-one percent (51%) of the affected landowners or the board of directors by resolution may petition the county commissioners to release those lands from the district. The petition shall describe by section or fraction thereof and by township and range the lands affected. After a finding that the granting of the petition is to the best interests of the affected landowners and the district, the board of county commissioners shall issue a certificate stating that the lands involved are released and separated from the district. Full minutes of the hearing shall be entered in the journal of the board of county commissioners and the certificate shall be delivered to the secretary of the district who shall, within thirty (30) days, cause the records of the district to be amended to exclude the lands affected. Notice shall be given, as provided in Section 1324.5 of this title, of the filing of a petition for release of lands as provided herein, fixing the time and place of hearing, and a copy of said notice shall be sent by certified mail to the chairman of the board of directors of the district in which the said lands are located.

STATEMENT OF THE CASE

This action began in 1997, when Pitt-7 filed a complaint asking the U.S. District Court for the Eastern District of Oklahoma to enjoin McAlester's water sales to industrial facilities located in the Taylor Industrial Park ("Park"), as well as several other properties. [Appendix B, at p. 7a.] McAlester developed the Park in 1981 and has been serving water to Park occupants since that time. [Appendix D, at p. 99a.]

Pitt-7 requested the injunction based on its claim of an exclusive right to serve water within its geographic territory. [Appendix B, at p. 7a.] The geographic territory was drawn in 1966 when Pittsburg was formed by an order of the Pittsburg County Board of Commissioners. [Appendix D, at p. 95a.]

Pitt-7's claim of an exclusive right to serve the Park and other properties is based on 7 U.S.C. § 1926(b). [Appendix B, at p. 7a.] Section 1926(b) is part of the Consolidated Farm and Rural Development Act ("CFRDA").[2] Through the Farmers Home Administration ("FmHA"),[3] the CFRDA provides direct loans and loan guaranties to rural water associations. These loans are to provide for the "conservation, development, use, and control of water."[4] FmHA loans are typically used by rural water associations for development and improvement of water systems, including laying water lines to new areas where rural water services are needed.[5]

Section 1926(b) provides anticompetitive protection to public entities that accept federal loans for the construction of water distribution facilities in rural areas. Section 1926(b) prohibits the limitation or curtailment of water service that is provided or made available by the borrower - in this case, Pitt-7. To fall within the prohibition, the limitation or curtailment of water service must be accomplished through "inclusion of the area served ... within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

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[2] 7 U.S.C. § 1921 *et seq.*

[3] As stated by the Tenth Circuit, "FmHA loans are now administered by the United States Department of Agriculture. *See* Pub. L. No. 103-354 (1994)." [Appendix B, at page 6a.] As the Tenth Circuit did, the Petitioners will refer to the "creditor entity" as the FmHA. [*Id.*]

[4] 7 U.S.C. § 1926(a)(1).

[5] *See, e.g., Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956 (E.D.N.Y. 1997) (describing usage by a rural water association of CFRDA-borrowed money, initially "to fund [the association's] water system," and later to fund an expansion of the association's water system into a new area).

In 1997, the Board of Commissioners entered two orders removing certain lands - including the Park - from Pitt-7's geographic boundaries. The underlying litigation raises the critical issue of whether the deannexation orders terminated Pitt-7's Section 1926(b) protection as to those areas. In other words, can Pitt-7 claim federal monopolistic protection for areas that have been removed from Pitt-7's state-law geographic territory.

The orders entered by the Board of Commissioners followed an adversarial hearing in which Pitt-7 specifically urged the Board of Commissioners that 7 U.S.C. § 1926(b) would prevent the removal of any lands from Pitt-7's state-law geographic territory. After hearing Pitt-7's arguments, the Board of Commissioners determined that it held the authority to enter its orders, removing the lands from Pitt-7's territory.

Pitt-7 failed to perfect its appeal to the state District Court of Pittsburg County. In appellate proceedings before the state District Court and later before the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court, Pitt-7 and the Landowners litigated the issue of Pitt-7's failure to perfect its appeal. More importantly, Pitt-7 and the Landowners litigated the preclusive effect of the Board of Commissioners' orders. Specifically, the Oklahoma Court of Civil Appeals held that Pitt-7 "did not timely comply with the statutory requirements to bring an appeal from the decision of the Board of County Commissioners releasing lands from the water district. That decision is final and binding on the water district even if based on an erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief." [Appendix G, at page 135a.] From this decision, Pitt-7 sought rehearing and certiorari relief in the state appellate courts, but failed to receive any further appellate relief.

The Tenth Circuit disregarded this decision by the Oklahoma Court of Civil Appeals. The Tenth Circuit's decision erroneously invalidates the effect of the Board of Commissioners' orders and the subsequent orders and judgments on appeal from those orders.

ARGUMENT FOR GRANTING WRIT

1. Contrary to controlling U.S. Supreme Court precedent, the Tenth Circuit failed to give appropriate preclusive effect to state administrative and appellate-court determinations involving federal-law issues.

In this case, the Tenth Circuit simultaneously determined that (1) the District Court was bound under the full faith and credit statute not to overturn the state administrative deannexation orders, [Appendix B, at page 25a], but that (2) the Board of Commissioners held narrow jurisdiction that does not require application of federal law, [Appendix B, at page 22a]. The Tenth Circuit disregarded the District Court's determination that the Board of Commissioners was faced with and decided the issue of whether 7 U.S.C. § 1926(b) impacted its authority to remove lands from Pitt-7's geographic boundaries. [Appendix D, at page 100a.]

On these erroneous legal bases, the Tenth Circuit failed to give appropriate preclusive effect to the Board of Commissioners' deannexation orders. Specifically, the Tenth Circuit erroneously determined that Pitt-7's Section 1926(b) anticompetitive protection for the deannexed lands extended past the time of the deannexation orders. [Appendix B, at page 35a-36a.] This ruling by the Tenth Circuit is in direct contravention of the Board of Commissioners' prior determination that Section 1926(b) had no preemptive impact on the Board's authority to remove lands from Pitt-7's geographic boundaries. [Appendix D, at page 100a.]

In concluding that the Board of Commissioners' deannexation orders do not have preclusive effect upon federal-court review, the Tenth Circuit reasoned that "the Board is a state-created agency with a narrow and specific jurisdiction when it comes to water districts," and that the Board of Commissioners' adjudicative role generally does not require "application of federal or state law." [Appendix B, at pages 22a, 23a.] This characterization ignores the teachings of the federal and Oklahoma courts regarding the competency of state and local administrative bodies to address federal and state law, and the principles of comity, federalism, and repose that underlie the application of preclusion doctrine to administrative decisions. In the light of those teachings, the District Court was correct in concluding that its exercise of subject-matter jurisdiction in the present case was barred by issue preclusion. The Tenth Circuit was in error when it reversed the District Court on this point.

Four decades ago, the U.S. Supreme Court held, "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). In a later case involving a federal claim under 42 U.S.C. § 1983, the Court held where state courts would give preclusive effect to the fact-finding of a state administrative body acting in a judicial capacity, "federal courts must give the agency's factfinding the same preclusive effect." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986).

None of these decisions attempts to define or question the competency of administrative agencies to decide federal- or state-law issues. Indeed, in 1991, the U.S. Supreme Court expressed approval of the application of both claim and issue preclusion to decisions of both state and federal administrative agencies, in a context that undoubtedly involved both factual and legal issues. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). In *Astoria*, the Supreme Court noted that issue preclusion would fail when the state administrative decision is unreviewed. *Id.* Even unreviewed administrative decisions, however, were held to be deserving of administrative estoppel effect, if supported by legislative intent, to be ascertained with the guidance of the presumption in favor of administrative estoppel. *Id.* at 108.

In *Astoria*, the Supreme Court noted that it has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria*, 501 U.S. at 107. "The principal holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, . . . which acts in a judicial capacity." *Id.* at 108 (citations omitted). Thus, the Tenth Circuit's rejection of the issue preclusive effect of the deannexation orders was clear error under *Astoria*.

This rule applies with equal effect to the state-court appellate orders that were entered by the District Court of Pittsburg County and the Oklahoma Court of Civil Appeals. In *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982), the Court explained that federal courts must give preclusive effect to state-court judgments affirming administrative decisions where: (1) "the courts of the State from which the judgments emerged would do so," *id.* at 482; (2) "the applicable requirements of the Due Process Clause" are satisfied, *id.*; (3) the claimant has a full and fair opportunity to present claims in an adversarial administrative hearing, *id.* at 483-84; and (4) "judicial review . . . is available to assure that [the] claimant is not denied any of the procedural rights to which he was entitled . . . ." *Id.* at 484. Adding that "[c]ertainly, the administrative nature of the factfinding process is not dispositive" of the preclusion question, *id.* at 484 n.26, the Court reaffirmed its holding in *Utah Construction*, "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'" *Id.* *See also Plaine v. McCabe*, 797 F.2d 713, 718-21 (9th Cir. 1986) (holding shareholder was collaterally estopped in federal court from challenging state corporate commissioner's finding merger price was fair, where shareholder had received adequate hearing and had not appealed decision to state court); *Valley Wood Preserving, Inc. v. Paul*, 785 F.2d 751, 753-54 (9th Cir. 1986) (federal due-process claims were barred by county board of supervisors' revocation of land use permits, where plaintiff had neither raised procedural objections before board nor appealed board's decision to state court); *Zanghi v. Old Brookville*, 752 F.2d 42, 45-46 (2d Cir. 1985) (holding that a Section 1983 action was precluded by administrative law judge's revocation of driver's license after adversarial hearing).

In finding an administrative decision preclusive, these decisions require only general guarantees of procedural trustworthiness: basic requirements of due process and availability of state-court review. This implicit deference to the authority of state courts and administrative bodies is consistent with the goal of preserving "comity and federalism interests." *Kremer*, 456 U.S. at 478. Moreover, "giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose [and] avoiding the cost and vexation of repetitive litigation and [serving] the public's interest in conserving judicial resources." *Elliott*, 478 U.S. at 798. *See also Astoria*, 501 U.S. at 107-08 ("Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."); *Feightner v. Bank of Oklahoma, N.A.*, 65 P.3d 624, 629 (Okla. 2003) ("The purposes of res judicata/claim preclusion and collateral estoppel/issue preclusion are to relieve the parties of the cost and vexation of multiple lawsuits, conserve the resources of the judiciary, and by preventing inconsistent decisions, encourage reliance on adjudication.").

The Board's deannexation proceedings here satisfy the criteria set forth in *Elliott*, *Kremer*, and *Utah Construction*, and fall within the ambit of the rule recognized by the *Astoria* Court. The Board acted in a quasi-judicial capacity in ruling on deannexation.[6] The Board's orders were issued after a public adversarial hearing that fully complied with the statutory notice requirements of Okla. Stat. tit. 82, § 1324.21. [Appendix G, at page 150a, 152a.] The orders were subject to review by the state district court.[7] In addition, the Oklahoma Court of Civil Appeals determined that the Board of Commissioners had jurisdiction to determine the federal issues that the District itself raised before the Board.[8]

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[6] The Panel acknowledged that "the Board was sitting as a quasi-judicial body." [Appendix B, at page 21a.] Similarly, the Oklahoma Court of Civil Appeals in the present case held that "[a]s a neutral tribunal whose decision affects the legal relation of particular lands vis-á-vis a corporate body, the board of county

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commissioners acts in a judicial or quasi-judicial capacity . . . ." [Appendix G, at page 144a.] It is well established that "the doctrine of collateral estoppel is applicable 'to the quasi-judicial determinations of administrative agencies when rendered pursuant to adjudicatory authority of an agency to decide issues brought before its tribunals employing procedures substantially similar to those used in a court of law.'" *Zanghi*, 752 F.2d at 46 (quoting *Ryan v. New York Tele. Co.*, 467 N.E.2d 487, 489-90 (N.Y. 1984)).

[7] The Tenth Circuit erroneously concluded that "none of the issues disputed in this federal case were actually decided by the Oklahoma state courts or necessary to their judgments; the state court rulings were essentially limited to determining the propriety of service by Pitt-7 in attempting to perfect its appeal of the deannexation." [Appendix B, at page 21a.] The Tenth Circuit failed to point out that the Board's orders were subject to judicial review, which is all that is required for preclusion. *Kremer*, 456 U.S. at 484. That Pitt-7 failed to perfect its appeal confirms, rather than undermines, the preclusive effect of the Board's orders. *See Benham v. Plotner*, 795 P.2d 510, 512 (Okla. 1990). In any event, the critical issue of the preclusive effect of the Board's orders was, itself, determined by the Oklahoma Court of Civil Appeals, and is thus entitled to preclusive effect. [Appendix G, at page 135a.]

[8] The Tenth Circuit suggests that "[t]he Deannexation Order did not address the legality of the deannexation order under federal law." [Appendix B, at page 9a.] Notwithstanding this observation by the Tenth Circuit, the District Court correctly noted that "[b]efore the Board entered its orders deannexing the Industrial Park and the Expo Center from the District's territory, [Pitt-7]

[Appendix G, at p. 135a.] By concluding that the Board of Commissioners is essentially without authority to determine federal- and state-law questions, the Tenth Circuit undermined the Board of Commissioners' core jurisdiction, as federal law issues will often be raised by parties in state administrative proceedings such as here. Principles of comity and federalism, in addition to preclusion doctrines, counsel against the Tenth Circuit's view of the Board of Commissioners' authority.

Oklahoma law determines the preclusive effect of the Board of Commissioners' deannexation orders. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). The Board of Commissioners' orders are entitled to full faith and credit in the Federal Courts. 28 U.S.C. § 1738. The Oklahoma Supreme Court has explained that "Oklahoma's jurisprudence has foreshadowed a willingness to apply preclusion doctrine to final adjudicative administrative decisions if appropriate and not subject to some recognized exception," adding that "generally, application of preclusion principles to final agency adjudicatory decisions is favored." *Feightner*, 65 P.3d at 628. The Oklahoma Court of Civil Appeals held that the deannexation orders in the present case are final and binding, [Appendix G, at page 135a], and "cannot be attacked in a collateral proceeding." [Appendix G, at page 135a.] "[T]he statutory appeal is the exclusive remedy and resort can not be had to an equitable

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argued before the Board that federal law would prohibit the deannexations. The Board determined that it had the authority to enter the deannexation orders." [Appendix D, at page 100a.] Indeed, on appeal before the state courts, both sides vigorously argued the preclusive effect of the administrative determinations on the basis that federal-law issues had been determined - namely, whether Section 1926(b) prevented the deannexation. [Appendix G, at page 135a.]

remedy."[9] [*Id.*] The deannexation orders are thus entitled to the same preclusive effect in the Federal Courts under Section 1738.

Under Oklahoma law, all issues decided by the Board of County Commissioners are deemed to be previously determined, and these issues cannot be relitigated in the action below or in federal court. *Carris v. John R. Thomas & Assocs.*, 896 P.2d 522, 527 (Okla. 1995). Res judicata requires a final judgment before it is applied. *Brumark Corp. v. Corporation Comm'n*, 924 P.2d 296, 301 (Okla. App. 1996). Under Oklahoma law, a judgment is final for res judicata purposes when the losing party has failed properly to perfect an appeal. *Benham*, 795 P.2d at 512. In this case, Pitt-7 failed to perfect its appeal from the deannexation order. [Appendix G, at page 135a.] As a result, Pitt-7 is barred from urging the Federal Courts to overrule or otherwise depart from the deannexation orders.

Given these authorities, the District Court correctly held that its "exercise of subject-matter jurisdiction to review the Board's deannexation orders is . . . barred by res judicata, collateral estoppel, claim and issue preclusion, and the Full Faith and Credit Act." [Appendix D, at page 101a.] Similarly, the Oklahoma Court of Civil Appeals was correct in ruling that the deannexation orders are "final and binding on the water district even if based on an erroneous application of federal law." [Appendix G, at page 135a.] It has thus already been conclusively adjudicated between the parties, in state court, that the deannexation orders are "not subject to collateral attack or an equitable challenge, such as declaratory relief." [Appendix G, at page 135a.] As noted above, this determination by the Oklahoma Court of Civil Appeals is entitled to full preclusive effect. The Tenth Circuit was in error when it disregarded the Oklahoma Court of Civil Appeals' determination of these issues.

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[9] *See also Ward v. Board of County Commissioners*, 246 P. 376 (Okla. 1926) ("No appeal having been taken from the findings of the board of county commissioners on this particular question, in our judgment such findings of the board of county commissioners on this point, in the absence of fraud or collusion, cannot be attacked in a collateral proceeding.").

In sum, the federal courts are barred by issue preclusion from entertaining Pitt-7's collateral attack, and are bound by Section 1738 to give full faith and credit to the Board of Commissioners' final administrative rulings and the subsequent orders on appeal. Pitt-7 had the opportunity before the Board of Commissioners to present all of its arguments against deannexation, including preemption. Indeed, Pitt-7 raised those arguments before the Board of Commissioners, and the Board's deannexation orders, which were subject to judicial review in the state courts, are conclusive adjudications of those arguments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

2. The Tenth Circuit committed error when it determined that 7 U.S.C. § 1926(b) preempts certain effects of the deannexation orders entered by the Board of County Commissioners.

The Tenth Circuit's ruling on preemption implicates the rule that state and federal law conflict, and thus federal preemption occurs, if (1) compliance with both federal and state law is physically impossible, or (2) if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines* *v. Davidowitz*, 312 U.S. 52, 67 (1941). This test is strengthened in favor of state law (absence of preemption) in cases where, as here, Congress legislates in a field traditionally occupied by the states. *ARC Am. Corp.*, 490 U.S. at 101; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In these cases, there is a presumption against preemption. *ARC Am. Corp.*, 490 U.S. at 101.

A divergence of views exists among the federal courts regarding the preemptive effect of Section 1926(b) on state administrative regulation of the boundaries of rural water districts. Despite this divergence of views, the better view under principals of comity and federalism is that state regulatory agencies must retain the basic tools of regulating rural water districts, including the deannexation provisions of Okla. Stat. tit. 82, § 1324.21.

The U.S. Court of Appeals for the Fifth Circuit described this issue as involving a difficult issue of federalism, namely whether Section 1926(b) precludes a state regulatory agency from modifying the service area of a federally indebted utility. *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 917 n.27 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). However, the *North Alamo* court reserved the issue for another day.

In November 1998, the U.S. District Court for the Northern District of Iowa addressed the issue, concluding that state regulatory agencies are allowed to determine whether a rural water district should be allowed to serve water to an area. *Rural Water System # 1 v. Sioux Center*, 29 F. Supp. 2d 975, 994 (N.D. Iowa 1998) (hereinafter *Sioux Center II*), *aff'd in part & rev'd in part on other grounds*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 121 S. Ct. 61 (2000). The *Sioux Center II* court held that Section 1926(b) was not intended to make federal courts into regulatory agencies for rural water systems. *Id.* at 994-95. In an earlier decision, the U.S. District Court for the Northern District of Iowa had suggested a different result. *Rural Water System # 1 v. Sioux Center*, 967 F. Supp. 1483, 1529 (N.D. Iowa 1997) (hereinafter *Sioux Center I*) ("[T]here is express and conflict preemption of any state law that purports to take away from an indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of § 1926(b).").

The more restrictive approach found in *Sioux Center I* ignores the necessity of providing governing state authorities with the means to regulate rural water districts. One member of the bench of the Tenth Circuit has shed recent light on this issue. In a separate opinion filed as part of a recent decision, the Honorable Mary Beck Briscoe of the U.S. Court of Appeals for the Tenth Circuit stated that deannexation serves as an available remedy for rural water customers to escape excessive water service costs charged by a rural water district that is protected by Section 1926(b). *Rural Water Dist. No.1 v. Wilson*, 243 F.3d 1263, 1276 (10th Cir. 2001) (Briscoe, J., concurring in part and dissenting in part). Judge Briscoe dissented from the Tenth Circuit's conclusion that the costs charged by a rural water district is a relevant factor to be considered in determining whether the district had made service available for purposes of Section 1926(b). Judge Briscoe suggested that her conclusion "does not leave rural water customers without a remedy. Cost might be a relevant factor in an action against [the rural water district] by rural water customers under state law. Kansas statutes provide for release of lands from the water district's service area '[i]f it becomes apparent that certain lands included within a district cannot be economically or adequately served by the facilities of the district.'" *Id.* (quoting Kan. Stat. Ann. § 82a-630 (1997)).

The Oklahoma Supreme Court issued a recent decision that reaffirmed the important role of county commissioners in regulating the geographical territory of rural water districts in Oklahoma. *Rural Water & Sewer District No. 4 v. Coppage*, 2002 OK 44, 47 P.3d 872. The *Coppage* court rejected an argument that "would limit County Commissioners' ability to release and separate areas from a water district even when it was in the best interests of the landowners and the water district to do so." *Coppage*, 2002 OK 44, ¶ 13, 47 P.3d at 874-75. Thus, like Judge Briscoe, the Oklahoma Supreme Court recognizes the important role of county commissioners in retaining an administrative role regarding the territorial boundaries of rural water districts in Oklahoma.

Federal law determines the "territory" of a rural water association by reference to governing state law. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 234 (6th Cir. 1996). The deannexation proceedings conducted by the Board of Commissioners pursuant to Okla. Stat. tit. 82, § 1324.21 represent the state law process that determines the District's boundaries. Section 1926(b) cannot, and does not purport to, replace state law governing the boundaries of rural water districts.

State-law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b). Section 1926(b) prohibits the curtailment of service through the "inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area." 7 U.S.C. § 1926(b) (emphasis added). The term "inclusion" is defined as "the act of including." *Webster's Third New International Dictionary* 1143 (1976 ed.) (emphasis added). In turn, the verb "to include" means "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle." *Id.* The term "granting," or "to grant," means "GIVE, BESTOW, CONFER ... to make a conveyance of: give the possession or title of esp. by a deed or formal writing." *Id.* at 989.

The federal courts that have interpreted Section 1926(b) have summarized these proscribed actions with the term "encroachment." *See, e.g.*, *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir. 1996) (using the term "encroachment"), *cert. denied*, 519 U.S. 1029 (1996). The term "encroachment" is defined as "the act or action of encroaching." *Webster's Third New International Dictionary* 747 (1976 ed.). The verb "to encroach" is then defined to mean "to enter by gradual steps or by stealth into the possessions or rights of another: TRESPASS, INTRUDE." *Id.*

Each of these terms encompasses an act of competition, rather than the regulation of a district's boundaries by a non-competing supervisory agency, pursuant to state law. The Fifth Circuit has equated "encroachment" with "competing franchises, new or additional permit requirements, or similar means." *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The new or additional permit requirements contemplated by the *Madison* court were imposed by the competing municipality. The competing franchises were granted by the competing municipality. The *Madison* court read Section 1926(b) expansively to also prohibit a condemnation action by a municipality. *Id.* The difference between the condemnation action contemplated by the *Madison* court and the deannexation proceedings at issue in the case before this Court are distinct and important. A condemnation action is a positive action taken by a competitor, seeking to take existing customers and revenue from the protected rural water association.

The Tenth Circuit committed error when it liberally expanded the term "other means," as used by the *Madison* court, to include state administrative regulation of the boundaries of a rural water district. [Appendix B, at page 35a.]

A state-law proceeding removing territory from a protected association's territory would be consistent with Section 1926(b) if the administrative body hearing the state-law proceeding does not provide water services in competition with the protected association. This type of regulatory action is distinct from the annexation of territory by a competing association into its own boundaries. *See, e.g.*, *Glenpool Util. Servs. v. Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988) (annexation by competing association), *cert. denied*, 490 U.S. 1067 (1989); *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.) (certification proceedings by competing association), *cert. denied*, 117 S. Ct. 586 (1996); *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057 (5th Cir. 1987) (condemnation by competing association); *Rural Water Sys. # 1 v. Sioux Center*, 967 F. Supp. 1483 (N.D. Iowa 1997) (annexation by competing association).

Section 1926(b) does not preempt state-law deannexation proceedings acted upon by a governing state regulatory agency that does not offer water services in competition with the protected rural water association. Congress and the courts interpreting Section 1926(b) have left the issue of a rural water district's boundaries to state law. The authority of federal courts over the regulatory actions by state administrative agencies – such as the Board of Commissioners – is implicitly limited. In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court held that Congress may regulate individuals, but not states. Congress may prohibit or require certain acts, but it cannot directly compel states to require or prohibit certain acts. Congress cannot regulate the states' regulation of, for example, interstate commerce.

This paradox was explained by Justice Harry Blackmun in a concurring opinion in *Pacific Gas & Elec. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 752 (1983). Justice Blackmun explained that there is an important distinction between the state's determination if nuclear power should be used in the state, and the determination of how a nuclear plant is to be constructed. Similarly, in this case, there is an important distinction between the determination by states of the nature and extent of a rural water district's right to serve and the federal role of prohibiting competition between municipalities and rural water districts. Congress has not preempted the entire field of regulation of rural water districts. Instead, Congress has simply prohibited competition with federally protected rural water districts, within their service area as defined by state law.

By permitting states to determine the right to serve, and to define the boundaries of rural water districts, Congress through Section 1926(b) has augmented state authority. An example of this was seen in the Fourth Circuit's decision in *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999). There, the court was faced with a federal statute that allowed states to determine the extent of federal prohibitions against gambling outside a state's territorial waters. "By permitting states to adjust the contours of federal law," the Fourth

Circuit held that the statute augmented state authority. The buzz-word that appears in *Casino Ventures* is "cooperative federalism."

Another example of this combined state and federal role can be seen in application of the Bankruptcy Code to family support obligations. In *Davis v. Davis*, 170 F.3d 475 (5th Cir. 1999), the Fifth Circuit noted that the federal bankruptcy laws allow state governments to enact exemption laws and determine the family support obligations that might be the subject of bankruptcy proceedings. By expressly reserving a role for state government, the Fifth Circuit held, the Congress had certainly left room for states to supplement federal law on the issue.

For the same reasons, Congress never intended to completely remove the authority of state administrative agencies to regulate the boundaries of rural water districts during the term of a federal loan. State-law deannexation proceedings cannot be preempted by federal law, for nothing else would remain to fill the regulatory void. Rather, the result would be continued litigation that stretches the purse strings of local government beyond limit.

CONCLUSION

The Court should grant certiorari in this case in order to correct the Tenth Circuit's erroneous failure to give preclusive effect to final judgments and orders of a state administrative body and state appellate courts.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 02-7080

[Filed February 6, 2004]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,

Plaintiff-Appellant,

v.

CITY OF McALESTER, a municipality, and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust,

Defendants-Appellees.

and

KENNETH W. SHERILL; LINDA F. SHERILL; BAR-19; HUNTSMAN EDISON FILMS CORPORATION, successor to Blessing Corp., d/b/a Edison Plastics; MIG, INC.; SOUTHEAST OKLAHOMA BOX COMPANY; TRI-CAT, INC.; SIMMONS POULTRY FARMS, INC.; DENNIS DEFRANGE; TERRY KINYON; PITTSBURG COUNTY

REGIONAL EXPOSITION AUTHORITY;)
THE BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF PITTSBURG; H. G.)
GILLIAM; BILL WEBBER; OBEN)
WEEKS; THUNDERCREEK GOLF COURSE)
TRUST AUTHORITY,)
Defendants.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

JUDGES: Before HENRY, HOLLOWAY, and MURPHY, Circuit Judges.

ORDER

The parties' petitions for rehearing and for rehearing en banc are denied, except with regard to the "internal inconsistency," *see* Appellee's Pet. for Reh'g at 8-9 n.5, regarding the description of "Group 3" customers in the panel opinion. *See Pittsburg County Rural Water Dist. No. 7. v. City of McAlester*, 346 F.3d 1260, 1270, 1277 (10th Cir. 2003). With regard the discussion of "Group 3" customers, the court now clarifies the panel opinion as follows:

> The district court's holding that "when a municipality is serving water to a property prior to a water district's FMHA loan date, the rural water district has no right to serve water to that property, and thus, no 1926(b) protection," *see id.* at 1277 (quoting Aplt's App. at 1101), did not concern "Group 3" customers. Instead, that district court ruling concerned customers served by McAlester prior to the date of the 1994

> FMHA loan. It is as to those customers that the panel held: "all § 1926 claims based on service by McAlester to customers within the limitations period were not otherwise barred by the fact that McAlester was serving those customers prior to the 1994 loan." *Id.* at 1277.

The amended opinion reflecting this clarification is attached.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 02-7080

[Filed February 6, 2004]

PITTSBURG COUNTY RURAL)
WATER DISTRICT NO. 7, an agency and)
legally constituted authority of the)
State of Oklahoma,)
Plaintiff-Appellant,)
)
v.)
)
CITY OF McALESTER, a municipality,)
and THE McALESTER PUBLIC WORKS)
AUTHORITY, a public trust,)
Defendants-Appellees.)
)
and)
)
KENNETH W. SHERRILL, LINDA F. SHERRILL,)
CITY OF McALESTER, BAR-19, BLESSING CORP.,)
d/b/a EDISON PLASTICS, MIG, INC.,)
SOUTHWEST OKLAHOMA BOX COMPANY,)
TRI-CAT, INC., SIMMONS POULTRY)
FARMS, INC., DENNIS DeFRANGE, TERRY)
KINYON, PITTSBURG COUNTY)
REGIONAL EXPOSITION AUTHORITY, THE)

BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF PITTSBURG, H.G.)
GILLIAM, CHAIRMAN BILL WEBBER, OBEN)
WEEKS, and THUNDERCREEK)
GOLF COURSE TRUST AUTHORITY,)
Defendants.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

JUDGES: Before HENRY, HOLLOWAY, and MURPHY, Circuit Judges.

OPINION

HENRY, Circuit Judge.

The Pittsburg County Rural Water District Number 7 (Pitt-7) is a rural county water association in Oklahoma. The City of McAlester (McAlester) is a municipality in Oklahoma. Both Pitt-7 and McAlester are subdivisions of the State of Oklahoma, and both are water providers. Pitt-7 sued McAlester and a number of other entities under: (1) 42 U.S.C. § 1983, based on the claim that the defendants violated Pitt-7's exclusive right under 7 U.S.C. § 1926 to provide water to customers within the protected area; (2) federal antitrust law; and (3) state antitrust law. The district court, faced with a difficult set of issues, granted summary judgment for the defendants on certain § 1926 claims, dismissed certain other § 1926 claims, and dismissed Pitt-7's federal and state antitrust claims. For the reasons detailed below, we affirm in part, reverse in part, and remand.

I. BACKGROUND

A. 7 U.S.C. § 1926

In 1961, Congress amended 7 U.S.C. § 1926(a) to authorize the United States Farmer's Home Administration (FMHA) to make loans to nonprofit water service associations for "the conservation, development, use, and control of water."[1] Congress enacted 7 U.S.C. § 1926(b), in turn, to govern the terms of federal loans made to those associations. Section 1926(b) provides that, for an association indebted by a loan to the federal government under the statute, "the service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

B. The Board of County Commissioners of Pittsburg County, Pitt-7, the Loan from the FMHA, and McAlester

In 1963, Oklahoma lawmakers responded to Congress's 1961 amendment of 7 U.S.C. § 1926 by enacting a statute that "authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which they are established." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 (10th Cir. 1999) (citing Okla. Stat. Ann. tit. 82, § 1324.10(A)(4)). In

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[1] FMHA loans are now administered by the United States Department of Agriculture. *See* Pub. L. No. 103-354 (1994)). For the sake of simplicity, we refer to the creditor entity as the FMHA throughout the opinion.

1966, the Board of County Commissioners of Pittsburg County, Oklahoma (importantly, as will be seen later, an entity distinct from Pitt-7), incorporated Pitt-7 to "develop[ ] and provide an adequate rural water supply . . . to serve and meet the needs of rural residents within the territory of the district." Okla. Stat. Ann tit. 82, § 1324.3.

In 1967, Pitt-7 first took advantage of the availability of the federal loans by borrowing $300,000 from the FMHA. Pitt-7 remained continuously indebted to the FMHA until February 24, 1989, when Pitt-7 repurchased its outstanding debt to the FMHA. On June 15, 1994, Pitt-7 once again entered into a loan agreement with the FMHA, borrowing $162,500. *See* Aplt's App. at 1005 (Mortgage, dated June 15, 1994).

From its inception, Pitt-7's territory included both land within McAlester's territorial limits and land near, but outside of, McAlester's territorial limits. For nearly three decades through June 30, 1999, Pitt-7 serviced these portions of its area with water purchased from McAlester. During the 1980s and 1990s, the relationship between Pitt-7 and McAlester became increasingly strained, apparently due to Pitt-7's demands that McAlester stop selling water in areas over which Pitt-7 held an exclusive service right under § 1926, McAlester's refusal to comply, and McAlester's threats to terminate water sales to Pitt-7.

C. The Complaint, the Petition for Deannexation, and the Termination of Water Sales by McAlester to Pitt-7

On March 25, 1997, Pitt-7 filed this action in federal district court, alleging violations of 7 U.S.C. § 1926(b) as enforced through 42 U.S.C. § 1983, federal antitrust law, and various Oklahoma state laws, including antitrust. McAlester responded in two ways.

First, on May 12, 1997, more than six weeks after Pitt-7 had filed this action, McAlester, several other local government entities, and landowners within Pitt-7's territory petitioned the defendant-appellee Pittsburg County Board of County Commissioners to deannex a portion of Pitt-7's territory.[2] The deannexed properties included those properties previously designated for service by Pitt-7 that are disputed in this case: Industrial Park, the Pittsburg County Regional Exposition Center, the Thundercreek Golf Course, the Sherrill property, and the Fender residence. The petitions documented complaints by McAlester and by landowners within Pitt-7's territory concerning customer service, capacity, and pricing. Pitt-7 moved before the Board to strike the petitions on the grounds that federal law - specifically § 1926 - preempted the requested deannexation.

Second, in June 1998, the McAlester City Council passed a motion instructing that Pitt-7 "be given written notice by the City Manager that effective June 30, 1999, the City Council would no longer enter into a contract for the purpose of selling water to them." Aplt's App. at 437 (Minutes of

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[2] Oklahoma law provides a mechanism for county commissioners to release designated lands from a water district. Under 82 Okla. Stat. tit. 1991, § 1324.21, "fifty-one percent . . . of the affected landowners may petition the county commissioners to release those lands from the district." Upon review of that petition, if the Board of County Commissioners determines that "the granting of the petition is to the best interests of the affected landowners and the affected district," *id.*, then the designated lands are released, or "deannexed" from the water district's territory.

McAlester City Council Session, dated June 23, 1998). As of June 30, 1999, McAlester terminated water sales to Pitt-7.

D. The Deannexation Order and the Resulting Decisions by the Oklahoma District Court and the Oklahoma Court of Civil Appeals

In June 1997, after a hearing at which counsel for Pitt-7 and for the petitioners each argued its side of the question, the Board voted to enter a Deannexation Order, stating that "it is in the best interests of the landowner, and in the best interest of [Pitt-7], that such lands be released from [Pitt-7]." Aples' Supp. App. at 355 (Certificate Releasing Lands from Rural Water Dist. No. 7, Pittsburg County, Oklahoma, dated Jun. 27, 1997). The Deannexation Order did not address the legality of the deannexation under federal law.

Under Oklahoma law, "an appeal lies from an order of the Board of County Commissioners to the District Court whenever their orders or decisions are of a judicial or quasi judicial nature." *Chandler Materials Co. v. Bd. of County Comm'rs of Tulsa County*, 1953 OK 71, 208 Okla. 189, 254 P.2d 767, 770 (Okla. 1953). Pitt-7 appealed the deannexation to the Oklahoma District Court in Pittsburg County, which exercised jurisdiction over the appeal and then dismissed the appeal as not properly perfected on the ground that Pitt-7's service upon the Pittsburg County Board of County Commissioners was "not sufficient" under Oklahoma law. Aples' Supp. App. at 459 (Order of the Oklahoma District Court for Pittsburg County, dated Sept. 15, 1997).

Pitt-7 then appealed the Oklahoma District Court's ruling to the Oklahoma Court of Civil Appeals (OCCA). The OCCA initially stated that "the deannexation decision at issue here . . . clearly determines land use and is a legislative function.

It therefore follows that the trial court was without jurisdiction to hear Pitt-7's appeal." Aples' Supp. App. at 252 (Memorandum Opinion No. 90,114, dated May 19, 1998).

Though the prevailing party, McAlester filed a Petition for Rehearing in the OCCA. The OCCA granted the petition, vacated its initial opinion, and held that the Oklahoma district court *did* properly exercise jurisdiction over Pitt-7's appeal, reasoning that "as a neutral tribunal whose decision affects the legal relation of particular lands vis-a-vis a corporate body, the board of county commissioners acts in a judicial or quasi-judicial capacity." *Id.* at 209 (Opinion on Rh'g, dated Sept. 8, 1998). The OCCA further held - with no discussion - that "the decision of the Board of County Commissioners releasing lands from the water district . . . is final and binding on [Pitt-7] even if based on an erroneous application of federal law" and that "it is not subject to collateral attack or an equitable challenge, such as declaratory relief." *Id.* at 210. The OCCA therefore affirmed the trial court's dismissal. *Id.* Pitt-7's subsequent petition to the Oklahoma Supreme Court for a writ of certiorari was denied.

E. The First Amended Complaint, the Various Motions Filed in the District Court, and the District Court's Orders

Meanwhile, Pitt-7's federal district court action remained pending. In May 1997, Pitt-7 filed a motion in the federal district court for partial summary judgment. In June 1997, while the proceeding before the Board was pending, Pitt-7 filed a First Amended Complaint in federal district court, adding as defendants the groups that had petitioned for deannexation and the Board of County Commissioners and also challenging the prospective deannexation. *See* Aplt's App. at 71-89 (First Amended Complaint, dated June 2, 1997). Subsequently, McAlester and the other defendants filed a series of motions for partial summary judgment and motions to dismiss.

Between November 1997 and September 1998, the federal district court issued a series of dispositive orders adjudicating the motions in favor of the defendants, ultimately either dismissing or granting summary judgment against Pitt-7 on all of Pitt-7's claims. *See* Aplt's App. at 143 (Judgment of the United States District Court, filed Oct. 15, 1998). Two of the district court's holdings in these orders are relevant to this appeal.

First, the district court examined the impact of Pitt-7's repurchase of its debt in 1989 and determined that any protections afforded Pitt-7 under § 1926(b) were extinguished along with its indebtedness to FMHA. Because Pitt-7 became indebted to FMHA again in 1994, the district court decided that the only viable claims at issue arose from actions taken by McAlester after June 15, 1994.

Second, the district court assessed whether Pitt-7 had made service "available" under § 1926. The district court found that Pitt-7 had "water lines in proximity to the properties," Aplt's App. at 139 (District Court Order, dated Sept. 30, 1998), but that Pitt-7 "must also demonstrate that the lines in place are of sufficient capacity to handle the water needs of the customers to be served at the present time." *Id.* "With each property referenced," found the district court, "Pitt-7 will require the customer to pay for an extension to its existing water lines in order to provide service." *Id.* Based on these findings, the district court determined that Pitt-7 "has not made service available to the disputed areas and is, therefore, not entitled to § 1926(b) protection." *Id.* at 140.

F. This Court's May 22, 2000 Order & Judgment

On Pitt-7's appeal of the district court's orders, a unanimous panel of this court reversed. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 2000 U.S. App. LEXIS 8838, No. 98-7148, 2000 WL 525942 (10th Cir. May 2, 2000). In an Order & Judgment, we held that the fact that Pitt-7's debt was satisfied in 1989 did not extinguish otherwise valid claims for violations of Pitt-7's § 1926 rights during the period of indebtedness. We stated that to hold otherwise "'would defeat the purpose of [§ 1926(b]) because a water association which repurchased . . . its debt but which otherwise met the statutory requirements would have no recourse for encroachments that occurred or began while it was indebted to the government.'" 2000 U.S. App. LEXIS 8838, at **3 (quoting *Sequoyah*, 191 F.3d at 1200) (brackets and ellipses in original). We also held that the district court employed the test for determining whether Pitt-7 had made service "available" in "an inappropriately restrictive manner" because the district court did not consider service that could have been made available in a reasonably short time. 2000 U.S. App. LEXIS 8838, at **4. The Order and Judgment declined to reach an array of issues, including the question of whether Pitt-7's § 1926 rights over the deannexed territory survived the deannexation, and remanded the case "for further proceedings consistent with this Order and Judgment." *Id.* On remand, the case was reassigned by the United States District Court for the Eastern District of Oklahoma to a different district court judge (from Burrage, J. to Payne, J.).

G. The Second Amended Complaint

In January 2001, Pitt-7 filed a Second Amended Complaint. The Second Amended Complaint summarized the proceedings before the Pittsburg County Board of County

Commissioners, the state court, the federal district court, and this court, and added the now finalized deannexation to the items complained of in the suit. The Second Amended Complaint alleged causes of action for violation of: (1) 42 U.S.C. § 1983 under 7 U.S.C. § 1926; (2) federal antitrust laws; and (3) state antitrust laws. As for remedies, the Second Amended Complaint sought a declaratory judgment on the City's right to sell water in Pitt-7's territory, a declaratory judgment clarifying the various interested parties' rights and legal relations, multiple injunctions relating to the land areas deannexed, an injunction requiring McAlester to provide water to Pitt-7, and a declaratory judgment stating that the deannexation was unlawful.

H. The District Court's Order on Remand

On June 7, 2002, the district court issued an order rejecting all of Pitt-7's claims. That order granted summary judgment for McAlester and the other defendants on Pitt-7's § 1983 claims based on the alleged violation of 7 U.S.C. § 1926 and dismissed Pitt-7's claim for injunctive relief under § 1926, federal antitrust, and Oklahoma antitrust law. For purposes of understanding the district court's order, the water customers consist of three groups:

> Group 1: those customers McAlester first served during the first period of indebtedness, July 3, 1967 to February 24, 1989;
>
> Group 2: those first served between February 24, 1989 and June 15, 1994, when Pitt-7 was not in debt to the federal government;

Group 3: those first served after the June 15, 1994 federal loan, when Pitt-7 incurred its latest debt to the federal government.

Regarding Group 1 customers, the district court concluded that Pitt-7's § 1926 claims involving those customers were time-barred. The district court reasoned that a two-year statute of limitations applied and that since the "instant case was filed March 25, 1997 . . . all alleged encroachments occurring prior to March 25, 1995 are barred by the statute of limitations." *Id.* at 1101-02 (Dist. Ct. Order, filed June 7, 2002, at 5.). As discussed below, we affirm this conclusion. Regarding **the other customers**, the district court found that all properties on which McAlester was serving water as of the beginning of the period (all but one of the properties at issue) "do not fall within [Pitt-7's] § 1926(b) protected territory." *Id.* at 1101 (Dist. Ct. Order at 5). The district court reasoned that "when a municipality is serving water to a property prior to a rural water district's FMHA loan date, the rural water district has no right to serve water to that property, and thus [is entitled to] no 1926(b) protection." *Id.* at 1101. In addition, the district court held that "application of Section 1926(b) protection to customers that were served by the City prior to the June 1994 loan date would constitute an unconstitutional taking." *Id.*

As for the § 1926 claims based on sales to customers in the deannexed area, the district court rejected those claims by Pitt-7 on three independent grounds: (1) that the Rooker-Feldman doctrine bars the district court from exercising jurisdiction over the claim; (2) that "exercise of subject-matter jurisdiction to review the Board's deannexation order is also barred by res judicata, collateral estoppel, claim and issue preclusion, and the Full Faith and Credit Act," *id.* at 1104 n.5; and (3) that "state law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b)." *Id.* at 1105. As detailed below, we affirm in part and reverse in part the district court's holdings concerning claims arising from sales to Group 3 customers.

II. DISCUSSION

Overview

Our review of the district court's ruling proceeds in six parts, (A)-(F). Part (A) holds that the district court erred in concluding that it lacked jurisdiction under the Rooker-Feldman doctrine. Part (B) analyzes the application of issue preclusion, claim preclusion, and full faith and credit to this case, and holds that the district court erred to the extent it held that each of those doctrines barred Pitt-7's suit. In Part (C), we hold that the district court did not violate the law of the case. Part (D) holds that the district court erred in part in applying the applicable statute of limitations. In Part (E), we discuss 7 U.S.C. § 1926 in some detail and hold that the district court erred in its application of that statute. Finally, Part (F) analyzes the district court's dismissal of Pitt-7's claims for injunctive relief under § 1926, federal antitrust laws, and state antitrust laws to compel McAlester to sell water to Pitt-7 and holds that the dismissal was not error.

A. Jurisdiction and Rooker-Feldman

The district court held that due to the proceedings in the Oklahoma courts, Pitt-7 is precluded by the Rooker-Feldman doctrine "from challenging the validity of the final state administrative rulings that removed the [denannexed area] from [Pitt-7's] territory." Aplt's App. at 1104. "The Rooker-Feldman doctrine is a jurisdictional prohibition." *Kenman*

Eng'g v. City of Union, 314 F.3d 468, 479 (10th Cir. 2002) (emphasis in original). We note that this court has previously exercised jurisdiction in this case. Further, our earlier decision acknowledged, and was decided subsequent to, the county and state court proceedings that were the basis of the district court's Rooker-Feldman jurisdictional holding on remand and are the basis of McAlester's jurisdictional arguments on appeal. Nonetheless, we have an ongoing duty to ensure that our jurisdiction is proper; the right to challenge jurisdiction is not subject to waiver. We review the district court's holding regarding subject matter jurisdiction de novo. *See id.* at 473.

Subject matter jurisdiction generally does not vanish once it properly attaches. *See Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."). There are exceptions to this general rule, although none apply to this case. For example, mootness will end jurisdiction where a controversy no longer exists. *See Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). But mootness has not divested the federal courts of jurisdiction in this case; the controversy is alive and well. And, as we now discuss in detail, the proceedings before the Pittsburg Board of County Commissioners concerning deannexation and the subsequent Oklahoma state court decisions did not divest the federal district court of jurisdiction under the Rooker-Feldman doctrine.

In this case, when Pitt-7 filed its initial Complaint in March 1997, the federal district court possessed valid federal question jurisdiction over the federal law claims arising under 42 U.S.C. § 1983, 7 U.S.C. § 1926, and federal antitrust laws. *See Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (reaffirming that a case arises under federal law when "'federal law creates the cause of action or . . . the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law'") (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1986)). The federal district court also had supplemental jurisdiction over the pendent state law antitrust claims to the extent the federal claims survived legal challenge and the district court exercised its discretion to exercise supplemental jurisdiction. *See Chicago*, 522 U.S. at 177 (stating that because the district court had original jurisdiction over the plaintiff's claims arising under federal law, the district court "thus could exercise supplemental jurisdiction over the accompanying state law claims so long as those claims constitute 'other claims that . . . form part of the same case or controversy.'") (quoting 28 U.S.C. § 1367(a)). The jurisdictional question we must resolve is whether, under the Rooker-Feldman doctrine, the proceedings in the Pittsburg Board of County Commissioners and the Oklahoma state courts subsequent to the commencement of the federal action operated to divest the federal district court of jurisdiction over this action.

By federal statute, "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari." 28 U.S.C. § 1257(a). The negative inference from this statutory authorization is that "federal review of state court judgments can be obtained only in the United States Supreme Court." *Kenman*, 314 F.3d at 473 (internal quotation marks omitted). Thus, "Rooker-Feldman precludes a party losing in state court from seeking what in substance would be appellate review of a state judgment in a United

States district court, based on the losing party's claim that the state court judgment itself violates the loser's federal rights." *Id.* (internal brackets, ellipses and internal quotation marks omitted).

The Supreme Court has applied the Rooker-Feldman jurisdictional bar to two categories of claims, those (1) actually decided by a state court, *see Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415, 68 L. Ed. 362, 44 S. Ct. 149 (1923); or (2) "inextricably intertwined" with a state court judgment, *see Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 n.16, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). Plainly, the merits of Pitt-7's claims for relief based on alleged violations of federal water rights law under 7 U.S.C. § 1926 and federal and antitrust law were not actually decided by the Oklahoma district court, which performed no merits analysis and dismissed Pitt-7's appeal due to defective service of process. Whether Pitt-7's federal court claims are "inextricably intertwined" with the Oklahoma state court's judgment is the question that we must resolve.

To apply the "intextricably intertwined" standard, we ask "'whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.'" *Kenman*, 314 F.3d at 476 (quoting *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996)). "In other words, we approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress." *Kenman*, 314 F.3d at 476 (emphasis omitted). If it did, Rooker-Feldman deprives the federal court of jurisdiction; if it did not, Rooker-Feldman provides no bar.

Applying that standard, Pitt-7's claims do not result from the state court judgments dismissing, and then affirming that dismissal of, Pitt-7's appeal of the Board of County Commissioners' deannexation for failure to perfect the appeal with proper service. Rather, Pitt-7's claims of alleged injury arise from (1) sales by McAlester to customers that were within Pitt-7's territorial boundary as of the June 1994 loan from the federal government, when Pitt-7 argues that the protections of 7 U.S.C. § 1926 attached; (2) the specter of McAlester refusing to sell water to Pitt-7 in alleged violation of § 1926 and federal and state antitrust laws; and (3) the act of deannexation by the Board of County Commissioners in alleged violation of Pitt-7's § 1926 rights. The remedies Pitt-7 seeks - damages, an injunction, and a declaratory judgment - are not dependent on an overturning in form or substance the state district court's dismissal of Pitt-7's appeal of the deannexation order or the OCCA's affirmance of that decision.

The timing of the deannexation proceedings corroborates this notion: with the exception of the deannexation, which had not yet occurred at the time of the filing of the Complaint and First Amended Complaint, the actions of the defendants that formed the basis of both iterations of the complaint had all been completed prior to the deannexation proceedings. The core of Pitt-7's claim, even as pleaded in the Second Amended Complaint, which was filed subsequent to the deannexation, is that McAlester has for years been selling water to certain customers that Pitt-7 claims it has the exclusive right to service under 7 U.S.C. § 1926, an argument the merits of which we address later in this opinion. We thus hold that the Oklahoma state court proceedings provide no bar to Pitt-7's claims under Rooker-Feldman. *Accord Kenman*, 314 F.3d at 477 (holding that the claim was barred in part because the plaintiffs sought "monetary damages attributable to losses they sustained as a result of being forced - by state court order - to remove magnesium from their Union City storage facility").[3]

B. Preclusion

In addition to finding Pitt-7's claims barred by the Rooker-Feldman doctrine, the district court held that its "exercise of subject-matter jurisdiction" is also barred by (1) issue preclusion, (2) claim preclusion and (3) the Full Faith and Credit Act. Aplt's App. at 1104 n.5. As we now discuss, the district court erred in its application of these three preclusion doctrines.[4]

1. Issue Preclusion

We apply Oklahoma state law to determine the preclusive effect, if any, of the Pittsburg County and Oklahoma proceedings on this federal court action. *See McFarland v. Childers*, 212 F.3d 1178, 1185 (10th Cir. 2000). "Under Oklahoma law, 'once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate the issue in a suit brought upon a different claim.'" *Id.* at 1185 (quoting *Fent v. Okla. Natural Gas Co.*, 1994 OK 108, 898 P.2d 126, 133 (Okla. 1994)). Here, none of the issues disputed in this federal case were actually decided by the Oklahoma state courts or necessary to their judgments; the state court rulings were essentially limited to determining the propriety of service by Pitt-7 in attempting to perfect its appeal of the deannexation. Thus, under issue preclusion doctrine, the Oklahoma state courts' rulings do not bar Pitt-7's claims in this action.

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[3] *See also* Charles Wright and Arthur Miller, 18 B Fed. Prac. & Proc. § 4469.1 (2003) ("A decision not on the merits also does not oust federal jurisdiction to decide on the merits."); *Whiteford v. Reed*, 155 F.3d 671, 674 (3d. Cir. 1998) ("This court has consistently held that where a state action does not reach the merits of a plaintiff's claims, then Rooker-Feldman does not deprive the federal court of jurisdiction.").

[4] We note also that unlike Rooker-Feldman, none of these doctrines goes to "jurisdiction" as the district court phrased it. Rather, preclusion doctrines provide affirmative defenses once a court exercises jurisdiction over a civil action, and they are subject to waiver where not timely raised. *See, e.g., Horwitz v. State Bd. of Med. Exam'rs of State of Colo.*, 822 F.2d 1508, 1512 (10th Cir. 1987).

Regarding whether issue preclusion flowed directly from the Pittsburg County Board of Commissioners' deannexation order, we note initially that the Board *was* sitting as a quasi-judicial body. Regardless, though, of the resolution of that question, the Board's order does not preclude Pitt-7's claims in this case because it did not resolve the merits of any of the § 1926, federal or state antitrust claims at issue in this action. The Board merely found that the statutory standard for deannexation--that "the granting of the petition is to the best interests of the affected landowners and the district," Okla. Stat. Ann, tit. 82, § 1324.21 - was satisfied, and the Board thus granted the deannexation petition. *See* Aples' Supp. App. at 355 (Certificate Releasing Lands, issued Jun. 27, 1997). In contrast, the questions before us concern primarily the legality under federal law of sales by McAlester before and after the deannexation to customers within Pitt-7's territorial border as it stood on June 15, 1994, the date Pitt-7 entered into an FMHA loan. Accordingly, issue preclusion flows from neither the proceedings before the Board nor the proceedings before the Oklahoma courts to bar Pitt-7's claims in this case.

2. Claim Preclusion

We next analyze whether, under Oklahoma law, the doctrine of claim preclusion bars Pitt-7's claims in this case. We consider the alleged preclusion of both the deannexation order and the subsequent state court appeal dismissed for lack of jurisdiction. Under Oklahoma law (which does not differ importantly from federal law in its treatment of claim preclusion), "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised *in that action.*" *Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, 796 P.2d 276, 283 n.27 (Okla. 1990) (emphasis in original). The question then is whether the claims raised by Pitt-7 in this action could have been raised and adjudicated on the merits in the proceedings before the Pittsburg Board of County Commissioners and the subsequent appeal of the deannexation Order to the state courts. We conclude that they could not have been.

The administrative proceeding at issue here - the deannexation proceeding - was one of quite limited substantive and remedial scope. Although a party may, as Pitt-7 did, file a petition in such a proceeding opposing deannexation on the ground that deannexation would violate federal law, the applicable standard in such a proceeding is not one established by federal law. Rather, the issue is whether Oklahoma's statutory standard for deannexation is met. Unlike Oklahoma district courts, the Board is not a court of general jurisdiction. Rather, the Board is a state-created agency with a narrow and specific jurisdiction when it comes to water districts, determining whether "the granting of the petition is to the best interests of the affected landowners and the district." Okla. Stat. Ann., tit. 82, § 1324.21. That determination is a fact-based, political, and policy-based calculus; it is not on its face one requiring, beyond that one judgment, application of federal or state law.

Thus, in the state administrative proceeding, Pitt-7 could not have "raised" - in the sense of lodging a complaint of law and seeking a legal or equitable remedy - the § 1926, federal antitrust, or Oklahoma antitrust claims at issue in the current suit. Under these circumstances, ordinary claim preclusion principles would not prevent the later assertion of a § 1983 claim (or any other beyond the competence of the Board of County Commissioners) following the Board's determination, even for a claim based on the same set of transactions that led to the deannexation proceeding. *See Dority v. Green Country Castings Corp.*, 1986 OK 67, 727 P.2d 1355, 1360 (stating that "the Restatement (Second) of Judgments [§ 83(3) (1982)] withholds res judicata effect from an agency's adjudicative decision if pursuit of a related claim in another tribunal would not disturb 'the scheme of remedies affordable by the administrative tribunal'"); Restatement (Second) of Judgments § 26(1)(c) (1982) (noting that claim preclusion is inapplicable where a plaintiff is "unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the [administrative tribunal]").

Moreover, the Supreme Court has recognized that "Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts," and that "in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (internal citation and internal quotation marks omitted). Section 1983 was enacted "to afford a federal right in the federal courts." *Monroe v. Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 5 L. Ed. 2d 492

(1961), overruled on other grounds, *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). "There is no support in § 1983's legislative history for a conclusion that, contrary to traditional claim preclusion principles, an adjudication in a state administrative tribunal of limited jurisdiction should preclude a later § 1983 action in federal court." *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 684 (4th Cir. 1994); *see also Haring v. Prosise*, 462 U.S. 306, 322 n.11, 76 L. Ed. 2d 595, 103 S. Ct. 2368 (1983) ("We fail to understand how [judicial economy] interests justify the adoption of a rule that would bar the assertion of [federal law] claims which have never been litigated."); *Frazier v. King*, 873 F.2d 820, 824 (5th Cir. 1989) (concluding that a rule of claim preclusion "would encourage plaintiffs to bypass administrative proceedings in order to preserve their claims under § 1983"). Indeed, due to Congress's desire to provide a federal forum for the vindication of federal rights, § 1983 contains no exhaustion requirement. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

It was therefore wholly proper for Pitt-7 to initiate this federal court action in March 1997 to attempt to vindicate its federal § 1926 and antitrust and pendent state antitrust claims in a federal forum without any predicate state proceedings. Pitt-7 *could* have filed a § 1983 action in state court alleging the § 1926 and antitrust claims at issue in this case. *See, e.g., Hondo, Inc. v. Sterling*, 21 F.3d 775, 780 (7th Cir. 1994) (noting that the plaintiffs in that case "could have brought a § 1983 claim in state court"). However, as was its right under § 1983, Pitt-7 chose a federal forum to vindicate its federal rights.

Accordingly, we conclude that the district court erred in applying claim preclusion from the Oklahoma proceedings to this case. We turn now to review the district court's full faith and credit holding.

3. Full Faith and Credit

A judgment of a state court must be accorded "the same full faith and credit in every court within the United States . . . as [it has] by law or usage in the courts of such State.'" *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1534 n.2 (10th Cir. 1996) (quoting 28 U.S.C. § 1738). As noted above, regarding "the decision of the Board of County Commissioners releasing lands from the water district," the OCCA held that "that decision is final and binding on the water district even if based on erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief." Aples' Supp. App. at 210. Thus, the district court was (and is on remand) bound under the full faith and credit statute not to overturn the Board's deannexation.

However, contrary to the district court's holding, the full faith and credit statute does not bar the various claims and remedies sought by Pitt-7 other than striking the deannexation order: neither the Board nor the Oklahoma courts made any holdings on the § 1926 and antitrust claims brought in the instant suit by Pitt-7, nor did any of their judgments foreclose any of the additional remedies sought by Pitt-7. Nor, as we discuss below in our analysis of the merits of Pitt-7's § 1926 claims, did the deannexation order lessen Pitt-7's § 1926 rights. Thus, the district court erred to the extent it held that the claims filed by Pitt-7 were barred by full faith and credit.

C. Law of the Case

Pitt-7 argues that the district court's rulings on both the statute of limitations of the § 1926 claim and the merits of the § 1926 claim violated the law of the case. "The 'law of the case' doctrine requires every court to follow the decisions of courts that are *higher* in the judicial hierarchy." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993) (emphasis supplied). "The doctrine applies to issues previously decided, either explicitly or by necessary implication." *Id.* "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." *Id.* The law of the case doctrine is "not an inexorable command but a rule to be applied with good sense." *Mason v. Texaco, Inc.* 948 F.2d 1546, 1553 (10th Cir. 1991) (internal quotation marks omitted). It is "a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Id.* (quoting *United States v. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 94 L. Ed. 750 (1950)).

Applying those standards, we hold that law of the case did not bar the district court's rulings on remand. Most significantly, nothing in the district court's ruling violated this court's previous Order & Judgment. Further, to the extent that the district court's ruling contradicted the previous district court rulings in this case, two factors counsel that we decline to apply the law of the case bar. First, the remand to the district court was general, stating only that the remand was "for further proceedings consistent with this opinion." *Pitt-7*, 2000 U.S. App. LEXIS 8838, 2000 WL 525992, at **5; *see also Mason*, 948 F.2d at 1552 ("When the further proceedings are specified in the mandate the district court is limited to holdings such as are directed. When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate."). Second, "the purposes of 7 U.S.C. § 1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid - both purposes aimed at promoting the public interest." *Jennings Water, Inc. v. City of North Vernon, Indiana*, 682 F. Supp. 421, 426 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

We are therefore reluctant to exercise our discretion under the law of the case doctrine to avoid the merits in a § 1926 case. *Cf. id.* ("As a matter of law estoppel cannot be involved to subvert the application of a statute enacted in the public interest."). Accordingly, based on our discretion and sound policy considerations, we hold that none of the district court's rulings violated the law of the case.

D. Statute of Limitations

Because the district court's statute of limitations rulings present questions requiring the interpretation of federal statutory law, our review is de novo. *See Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm.*, 327 F.3d 1019, 1030 (10th Cir. 2003). Regarding the statute of limitations, Pitt-7 argues that the district court's holding that Pitt-7's § 1926 claims were time-barred conflicts with our decision in *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999).

Pitt-7's challenge to the district court's statute of limitations ruling is correct in part. As we now discuss, the district court's ruling that the claims based on the Group 1 customers (those first served by McAlester from July 3, 1967 to February 24, 1989) are time-barred was *not* inconsistent with *Sequoyah*; however, the ruling that § 1926 claims based on sales to **other** customers are time-barred *was* error under *Sequoyah*.

Regarding the claims for sales to Group 1 customers, *Sequoyah* did not reach either the issue of whether the claims were filed within the applicable statute of limitations or whether application of § 1926 would constitute an unconstitutional taking, the key bases for the district court's ruling on the § 1926 claims concerning Group 1 customers. We have noted that "§ 1983 claims are best characterized as personal injury actions," and that therefore "the forum state's personal injury statute of limitations should be applied to all § 1983 claims." *Blake v. Dickason*, 997 F.2d 749, 750 (10th Cir. 1993) (internal quotation marks omitted). The district court found, and the parties do not dispute, that a two-year statute of limitations applies to the § 1983 action, since that is the limitations period under Oklahoma law for a personal injury cause of action. *See* Aplt's App. at 1100 n.3; Okla. Stat. Ann. tit. 12, § 95. The original complaint in this case was filed on March 25, 1997. Thus, unless there is an applicable exception, all claims that accrued prior to March 25, 1995, are time-barred.

As noted above, it is settled under our previous Order & Judgment in this case that Pitt-7 was "not indebted to [the FMHA] from February 24, 1989, the date of the repurchase, to June 15, 1994, the date of the most recent loan, and [therefore] cannot claim § 1926 protection for this time period." *Pittsburg County*, 2000 U.S. App. LEXIS 8838, 2000 WL 525942, at **3. This necessarily means that no violations could have occurred during the period between February 24, 1989, the date the first loan was extinguished, and June 15, 1994, the date Pitt-7 next assumed obligations under the second loan agreement with the FMHA. Thus, the prior alleged violations could not have been "continuing" between 1989 and 1994; claims based solely on the pre-January 24, 1989 loan period became time-barred in 1991. This case is thus distinguishable from the case primarily relied on by Pitt-7, *Rural Water Sys. # 1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1508 (N.D. Iowa 1997)("Actions that are alleged to be part of this series or pattern of wrongful acts have continued to occur until well within the limitations period."), *aff'd*, 202 F.3d 1035 (8th Cir. 2000). The district court thus did not err in dismissing those claims based on alleged pre-March 25, 1995 violations.

In contrast, the district court's ruling on claims based on sales to **other** customers was problematic. The district court held that "when a municipality is serving water to a property prior to a water district's FMHA loan date, the rural water district has no right to serve water to that property, and thus, no 1926(b) protection." Aplt's App. at 1101. However, faced with claims identical in structure to the continuing violation claims at issue here (i.e., claims that the municipality violated § 1926 by continuing to provide service during the protected period), *Sequoyah* authorized a cause of action by a water district that became indebted on an FMHA loan against a municipality where two conditions are satisfied. To prevail under *Sequoyah*, a water district must demonstrate for the property in question that during the protected period, it (1) was in debt to the federal government through a loan administered by the FMHA and (2) made service available. *Sequoyah*, 191 F.3d at 1201-05 (analyzing § 1926(b)). *Sequoyah* held that there existed disputed issues of material fact on the second prong of § 1926 and remanded the case. The fact that a municipality had provided service to those properties prior to the FMHA loan was no bar in *Sequoyah* to claims arising out of a city's service during the period of indebtedness.

Nothing in our prior Order and Judgment in this case was to the contrary. The district court's ruling conflicts with *Sequoyah* and was therefore error. Contrary to the district court's ruling, all § 1926 claims based on service by McAlester to customers within the limitations period were not otherwise barred by the fact that McAlester was serving those customers prior to the 1994 loan. We turn now to assess the merits of the district court's § 1926 rulings.

E. Did the district court err on the merits in granting summary judgment on the § 1926 claims?

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we draw all justifiable inferences in favor of Pitt-7 as the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We review de novo the district court's determination that Pitt-7's § 1926(b) rights were terminated by the deannexation because it involves an interpretation of federal statutory law. *Seneca*, 327 F.3d at 1030. We analyze Pitt-7's § 1926 claim in two steps. First, we analyze the rights Pitt-7 possessed under § 1926 prior to the deannexation and conclude that the district court must make findings on remand as to whether Pitt-7 has satisfied the requisite elements. Second, we explain why, *if* Pitt-7 indeed has such § 1926 rights, those rights are enforceable against McAlester for post-deannexation sales to customers in the deannexed area.

1. Pitt-7's § 1926 rights from June 15, 1994 up to the Time of the Deannexation

We analyze whether Pitt-7 qualified for § 1926 rights by applying the standards we articulated in *Sequoyah*. That decision stated that "to receive the protection against competition provided by § 1926(b)[,] a water association must (1) have a continuing indebtedness to the FMHA and (2) have provided or made available service to the disputed area." 191 F.3d at 1197. The analysis on the first prong is fairly clear: from June 15, 1994 to the present, Pitt-7, undisputedly a water district, has been indebted to the federal government under a loan governed by the terms of § 1926.

On the second prong - whether Pitt-7 has provided or made service available - we are hamstrung in our analysis by the district court's failure to follow our instructions on remand. Our prior Order & Judgment in this case stated that "we . . . reverse and remand because the district court applied the wrong standard to determine whether the District made service available to the disputed customers."2000 U.S. App. LEXIS 8838, 2000 WL 525942, at **4. The Order & Judgment noted that "the district court seems to have limited its examination to [Pitt-7's] ability to provide service today, when a water association meets the pipes-in-the-ground test by demonstrating that it has adequate facilities within or adjacent to the area to provide service to the area *within a reasonable time* after a request for service is made." *Id.* (internal quotation marks omitted) (emphasis in original). "At the very least," we stated, "the district court must address the reasonableness of the time estimates on remand." *Id.*

Unfortunately, the district court on remand did not "address the reasonableness of the time estimates," nor did the district court make *any* findings on whether Pitt-7 has made service available. Rather, the district court rested its conclusion that Pitt-7's § 1926 claims fail on its holding that the actions of McAlester are not those proscribed by § 1926. In doing so, the district court did not resolve the critical threshold question of whether Pitt-7 has made service available, the second prong of the § 1926 eligibility test. This omission was error, and on remand, we reiterate the instructions from our Order and Judgment that the district court make findings on this second prong of the § 1926 test. Specifically, the district court is instructed to, for the dates within the limitations period, analyze for each disputed property whether Pitt-7 made service "available."

2. Assuming Pitt-7 is Entitled to § 1926 Protections, May Pitt-7 Assert § 1926 Rights Against McAlester for Post-Deannexation Sales to Customers in the Deannexed Area?

We turn now to analyze whether, assuming that Pitt-7 was entitled to § 1926 protection, the district court correctly held that Pitt-7's § 1926 claim failed because "state law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b)." Aplt's App. at 1105. McAlester argues that the district court's ruling should be upheld because § 1926 does not apply to the acts of the defendants in this case, and that if § 1926 *is* read to apply to the acts of the defendants in this case, that application would violate the Constitution's *spending clause*, constitute an unconstitutional taking, and eviscerate states' regulatory protections against exorbitant pricing by rural water associations. We address each contention in turn.

a. Assuming Pitt-7 Is Entitled to Section 1926 Rights, Does Section 1926 Apply to McAlester's Conduct?

We first discuss the scope of § 1926 and then apply the statute to McAlester's conduct.

i. The Scope of Section 1926

Section 1926(b) provides that, for an association indebted to the FMHA, "the service provided or made available . . . shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b). In support of the district court's ruling, McAlester contends that under a literal reading of § 1926, its actions do not violate § 1926 because "to run afoul of Section 1926(b), a municipality must actively compete for the disputed water customer, by moving into the disputed territory through inclusion of the territory within its corporate boundaries." Aples' Br. at 44. Because McAlester did not do so, it maintains that it therefore could not have violated § 1926. Challenging the district court's ruling, Pitt-7 argues that such a literalistic reading of § 1926 is impermissibly narrow under our decisions.

We are persuaded by Pitt-7's argument. We have recognized that "Congress enacted 7 U.S.C. § 1926 (b) as part of a federal statutory scheme to extend loans and grants to certain associations providing . . . water service or management . . . or essential community facilities to farmers, ranchers, and other rural residents." *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d

1211, 1214 (10th Cir. 1988). We have noted that "doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FMHA-indebted party seeking protection for its territory." *Sequoyah*, 191 F.3d at 1197. *See also North Alamo Water Supply Corp. v. City of San Juan*, Tex., 90 F.3d 910, 915 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FMHA-indebted rural water associations from municipal encroachments.").

Federal courts' broad construction of § 1926(b) reflects the two key goals underlying its enactment. The first was "to provide greater security for the federal loans made under the program." *Sequoyah*, 191 F.3d at 1196. By "protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system," *id.*, § 1926 protects the financial interests of the United States, which is a secured creditor of the water association, from reduction of the water association's revenue base. The second interest is the promotion of rural water development "by expanding the number of potential users of such systems, thereby decreasing the per-user cost." *North Alamo*, 90 F.3d at 915.[5]

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[5] The Senate Report of the bill that enacted § 1926 stated:

> This section would broaden the utility of this authority [of the Department of Agriculture to aid rural entities] somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of

We have noted that § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, *or similar means.*" *Glenpool*, 861 F.2d at 1214. In light of this congressional mandate, where the federal § 1926 protections have attached, § 1926 preempts local or "state law [that] can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law." *Rural Water Sys. No. 1*, 967 F. Supp. at 1529, cited with approval in *Sequoyah*, 191 F.3d at 1202, 1202 n.8, 1203, and 1204 n.10.

To the extent that a local or state action encroaches upon the services provided by a protected water association, the local or state act is invalid. *See Title Ins. Co. of Minn. v. I.R.S.*, 963 F.2d 297, 300 (10th Cir. 1992) (noting that "under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, federal law preempts and invalidates state law which interferes with or is contrary to

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> financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, *the cost per user is decreased and the loans are more secure in addition* to the community benefits of a safe and adequate supply of running household water. A new provision has been added *to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.*

S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (emphasis supplied).

federal law."); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499, 1504 n.4 (10th Cir. 1994) ("'For the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'") (*quoting Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)). There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).

ii. Applying § 1926 to McAlester's Conduct

If the district court determines on remand that Pitt-7 meets the two-part test for § 1926 protection regarding the deannexed area, the question becomes whether McAlester's sales to customers in the deannexed area purport to take away from Pitt-7's § 1926 protected sales territory. It is clear that they do. The deannexation, ordered after McAlester and others petitioned the County Board of Commissioners, was aptly titled "Certificate Releasing Lands from Rural Water District No. 7, Pittsburg County, Oklahoma; " it literally ordered, regarding the designated portions of Pitt-7's territory, that "such lands be released from [Pitt-7]." Aples' Supp. App. at 354-55. McAlester's alleged sales in § 1926-protected territory, subsequent petitioning for the deannexation of a portion of Pitt-7's territory, and commencement of sales to customers in the deannexed area would violate "the congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, *or similar means*." *Glenpool*, 861 F.2d at 1214. To read § 1926 otherwise would be inconsistent with the understanding of the statute that we have previously adopted. When § 1926 protection attaches for a water district's service to a property within the water district's territory under the two-part test from *Sequoyah*, the water district has *exclusive* water service rights over that property until the water district's loan to the FMHA is paid off or the water district fails to make service "available" to the property in question. We thus hold that *if* Pitt-7 was entitled to § 1926 protection, the deannexation order is no bar to McAlester's liability and that McAlester's conduct falls within the conduct proscribed by § 1926.[6]

b. Spending Clause

The district court did not address the Constitution's Spending Clause. McAlester, however, argues that if § 1926 *is* read to apply in this case, that application would exceed the scope of the federal Spending Clause power.

We disagree. *The Spending Clause* provides that "the Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Section 1926 has been repeatedly upheld as a valid exercise of Congress's authority under the Spending Clause. *See, e.g.*, *Glenpool*, 861 F.2d at 1215-16

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[6] Thus, the § 1926 protections, to the extent Pitt-7 qualified for such protections, were established as of June 15, 1994, and not altered by the deannexation. Federal, not state law, controls the geographic scope of the § 1926 protections, which attach as of the entry into the loan agreement and remain as long as the conditions for § 1926 protection discussed above - FMHA indebtednesss and service "made available" - are met. We therefore need not address the parties' dispute concerning whether under Oklahoma law, water districts may only sell water within the district's borders.

& 1215 n.1 (explaining that the conditions imposed by § 1926 on Oklahoma municipalities that enter into loan agreements with the FMHA fit comfortably within Congress's spending clause powers because "Oklahoma, through its authorized entity . . . bound itself and all its subdivisions, including [cities], to the conditions it had accepted").

Application of § 1926 to the facts of this case is similarly consistent with the limits of the Spending Clause. "Congress' spending power enables it to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Kansas v. United States*, 214 F.3d 1196, 1198 (10th Cir. 2000) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). There are "four general restrictions on Congress' exercise of power under the Spending Clause." *Kansas*, 214 F.3d at 1199. "First, Congress's object must be in pursuit of the general welfare." *Id.* (internal quotation marks omitted). "Second, if Congress desires to place conditions on the states' receipt of federal funds, it must do so unambiguously so that states know the consequences of their decision to participate." *Id.* "Third, the conditions must be related to the federal interest in the particular program. The required degree of this relationship is one of reasonableness or minimum rationality." *Id.* (internal citation and quotation marks omitted). "Fourth, there can be no independent constitutional bar to the conditions." *Id.* "The fourth restriction stands for the more general proposition that Congress may not induce the states to engage in activities that would themselves be unconstitutional." *Id.*

The only one of these factors seriously contested by McAlester is the second factor: whether Congress has placed conditions on the receipt of federal funds in loans to rural water districts "unambiguously." McAlester argues that if we apply § 1926 in this case, "the State of Oklahoma would have never had an opportunity to choose not to accept the funds that were borrowed by [Pitt-7] in 1994 . . . Congress will have failed to state the conditions imposed by Section 1926(b) with sufficient clarity." Aples' Br. at 48.

We disagree. The Oklahoma legislature formed the water districts so that the state, through the water districts, could avail itself of the loans made available through § 1926, i.e. "to borrow money from the federal government to accomplish the purposes for which they are established." *Sequoyah*, 191 F.3d at 1194. Given § 1926's text and the judicial decisions referenced above uniformly announcing and applying a rule of liberal construction to effectuate the statute's purposes, the State of Oklahoma and its subdivisions were on sufficient notice that through their *choice* to borrow money from the federal government, they agreed to abide by § 1926(b)'s proscriptions, including those against shrinking the protected rural water association's service area. We thus reject McAlester's attempt to save the district court's judgment by reference to limits under the Spending Clause.

c. Takings Clause

Next, McAlester argues that the district court was correct in concluding that "application of § 1926(b) protection to customers that were served by McAlester prior to the June 15, 1994 loan date would constitute an unconstitutional taking." Aples' Br. at 50.[7] We disagree. Application of 7

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[7] McAlester does not advance this argument regarding Group 3 customers, presumably because, since the § 1926 protections would have attached prior to the Group 3 customer sales, there were no customer relationships of McAlester's to "take."

U.S.C. § 1926 to Group 1 or Group 2 customers decisively does not constitute a taking; indeed, the federal government's loan of several hundred thousand dollars to Pitt-7 as a subdivision of the State of Oklahoma is the near-*opposite* of a taking.

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The aim of the Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Eastern Enters. v. Apfel*, 524 U.S. 498, 522, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (internal quotation marks omitted). When a regulation adjusts the benefits and burdens of certain economic action to promote the common good, such regulation may in *certain* circumstances effect a taking. *See id.* at 522-23.

A party challenging governmental action as an unconstitutional taking "bears a substantial burden." *Id.* at 523. "In light of that understanding," the Supreme Court has stated, "the process for evaluating a regulation's constitutionality involves an examination of the justice and fairness of the governmental action." *Id.* (internal quotation marks omitted). To aid lower courts engaging in such an examination, the Supreme Court has "identified several factors . . . that have particular significance: the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* (internal quotation marks omitted).

Applying these three factors compels our holding that no taking is effected in this case by application of § 1926. First, as for economic impact, the regulation in question flowed from an agreement in which the federal government loaned Pitt-7, a political subdivision of the State of Oklahoma, more than $160,000 to aid the water district's development, at an attractive fixed interest rate of five percent.

As for reasonable investment-backed expectations, under § 1926 and the judicial decisions construing that statute, the State of Oklahoma was on sufficiently clear notice that interference with the boundaries of a rural water association during the period that they were protected by § 1926 rights was precluded by law. To the extent McAlester invested in infrastructure on the assumption that § 1926 was no bar to sales in the deannexed portion, that assumption was not reasonable.

Finally, the character of the imposition of federal law on the state entities in particular confirms the reasonableness of requiring McAlester as a subdivision of the State of Oklahoma to comport with the conditions of § 1926. The requirements of § 1926 flow, not from legislative or executive fiat, but from the entry by a water district - a state subdivision - into an agreement to borrow money from the federal government. The State of Oklahoma was "ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Kansas*, 214 F.3d at 1203. "Offers of conditioned benefits," such as those available to capital-starved rural water associations through preferable loan terms from the federal government, "'expand rather than contract the options of the beneficiary class, and so present beneficiaries with a free choice.'" *Id.* (quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1428 (1989)). In addition, the State of Oklahoma could end the restrictions imposed by § 1926 by paying off Pitt-7's loan and thus ending the period of indebtedness critical to § 1926 protection. We note also that the constraints imposed by

§ 1926 do not preclude McAlester from selling water. Presumably, McAlester's facilities remain a source of significant revenue: we see no reason why McAlester may not sell water wholesale to Pitt-7 or to nearby suppliers, or retail to customers in non-§ 1926-protected areas in the vicinity. For all of these reasons, we conclude that the district court erred in ruling that application of § 1926 to those customers first served by McAlester (Groups 1 and 2) would constitute a taking.

d. Regulation of Rural Water Districts

The district court read § 1926 not to apply to this case because, in its view, to apply § 1926 to the facts of this case "would limit [the] County Commissioner's ability to release and separate areas from a water district even when it was in the best interests of the landowners and the water district to do so." Aplt's App. at 1104-05. Similarly, McAlester advances the policy argument that if we decline to recognize the right of a local government to deannex portions of a rural water association protected by § 1926, no regulatory bar will remain to constrain § 1926-protected rural water districts from charging excessively high prices. Although the prospect of such a scenario *would* give us reason to pause, we do not find McAlester's parade of horribles an accurate depiction of the regulatory framework in place before, or after, our decision today.

McAlester relies on the argument in a dissenting opinion to our circuit's holding in *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263 (10th Cir. 2001). The dissent in that case reasoned that rural water customers dissatisfied with high-cost water provided by the federally sanctioned monopoly water association could file under the Kansas analogue to Oklahoma's deannexation statute for "release of lands from the water districts service area." *Id.* at 1276 (Briscoe, J., concurring in part and dissenting in part).

However, rural water associations protected by § 1926 *are* subject to price restraints under the threat of losing their § 1926 protection. They are not free at their whim to price monopolistically. As we have stated, "even [if] a rural water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made, the cost of those services may be so excessive that it has *not made those services available* under § 1926(b)." *Id.* at 1271 (majority) (internal citations and quotation marks omitted) (emphasis supplied). "If the city can show that [the rural water district's] rates or assessments were unreasonable, excessive, and confiscatory," we stated, "then the water district has not made services available under § 1926(b)," and therefore is not entitled to § 1926 protection. *Id.*

We reaffirm this approach today. This manner of factoring in cost, in addition to being binding circuit law, is a sensible rule as a policy matter. We mitigate the tendency of monopolists to price exorbitantly by conditioning the right to earn the governmentally sanctioned monopolist status on the water association's employing prices that, even if high, are not prohibitive. The doctrine's aim is to help avoid the unattractive scenario of water remaining unavailable as a practical matter due to excessively high monopolistic pricing without legal recourse for consumers and with no additional market entry by a supplier in sight. We need not define what it means for a price to be "so excessive that it has not made the services available," for the purpose of § 1926 analysis, *id.* at 1271; that is for the district court to determine on remand, perhaps with the benefit of expert witness testimony on the subject.

We thus reject the argument advanced by McAlester and embraced by the district court that, regardless of the terms of § 1926 agreed to by the State of Oklahoma through the entry into the loan agreement, we must out of deference to state regulatory prerogative refuse to apply § 1926. Such a view reflects "misplaced federalism concerns." *United States v. Welch*, 327 F.3d 1081, 1093 (10th Cir. 2003).

To recap our § 1926 substantive analysis, we hold, notwithstanding McAlester's arguments under the Spending Clause, the Takings Clause, and regulatory policy concerns, that the rights under 7 U.S.C. § 1926, to the extent they had vested, were not extinguished by the deannexation and are enforceable against McAlester's conduct. The district court erred in holding to the contrary.

Accordingly, we *also* reverse the district court's corollary ruling that Pitt-7 lacked standing to lodge claims relating to the Sherrill property, an issue we review de novo. *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). Given our analysis on the § 1926 claim, Pitt-7 has shown the necessary imminent threat of injury of its § 1926 rights to establish the requisite injury in fact for standing: Sherrill is an entity within the deannexed territory that has requested water service and has asserted that it has the right to deannex and receive water service from an entity other than Pitt-7.

We turn now to review the district court's dismissal of Pitt-7's claims for injunctive relief.

F. Did the District Court Err in Dismissing Pitt-7's Claim for Injunctive Relief to Prohibit McAlester from terminating water sales to Pitt-7?

Pitt-7 sought prospective injunctive relief against McAlester from terminating water sales to Pitt-7 on the grounds that such termination would violate § 1926(b), state antitrust laws, and federal antitrust laws. The district court dismissed Pitt-7's claims for injunctive relief. We review the district court's dismissal de novo. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). As we discuss below, the district court did not err in dismissing the claims for injunctive relief.

1. § 1926(b)

The district court held that "termination of wholesale water sales to [Pitt-7] is not prohibited" by § 1926. Aplt's App. at 1109. On appeal, Pitt-7 argues that the purpose of § 1926 is to maintain the ability of the water district to serve its customers with prices kept relatively low through economies of scale and to ensure the security of the federal government's loan. Pitt-7 maintains that McAlester's refusal to sell undermines that purpose, for "to read a loophole into the absolute prohibition . . . and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of 1926(b)." Aplt's Br. at 54 (internal quotation marks omitted).

Although Pitt-7's argument is not without force, it is too far afield from § 1926's text or the decisional law applying § 1926 for us to embrace it. First, there is nothing in the statute's text concerning a water supplier's refusing to deal with a § 1926-protected water association. Second, even under the broad reading of § 1926 given by federal courts discussed above, the inquiry in § 1926 claims has focused on whether the defendant attempted an encroachment through interference with *boundaries* or by purporting to *compete* with the § 1926-protected water district within the protected territory. Refusal to sell water is clearly not interference with boundaries. Further, although such refusal might be characterized as anti-competitive behavior, it is encroachment through competition, not *anti*-competitive acts, that § 1926 bans.

Moreover, remedies *are* available to challenge unlawful refusals by a supplier to sell a product. To the extent, if any, that Pitt-7 has a claim concerning McAlester's refusal to sell water, that claim sounds in antitrust. *See, e.g.*, I ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), at 161 ("Vertical refusals to deal generally arise where a manufacturer refuses to do business with a distributor in the first instance or terminates an existing distributor. . . . Vertical refusals to deal have been challenged as unreasonable trade restraints under . . . the Sherman Act."). We therefore turn to Pitt-7's federal and state antitrust claims.

2. Antitrust Claims

Pitt-7 alleges violation of federal and Oklahoma antitrust laws on the theory that McAlester's refusal to sell water to Pitt-7 violates the essential facilities doctrine. The district court dismissed all of Pitt-7's claims for federal and Oklahoma law antitrust violations. The district court found that (1) McAlester was subject to state action immunity from suit on either the federal or state antitrust claim; and, in the alternative, that (2) the antitrust claims failed on the merits because Pitt-7 could not establish the elements necessary to sustain an essential facilities claim. We decline to address the state action immunity rulings because, as discussed below, Pitt-7's essential facilities claims fail on the merits.

We can comfortably address the merits of Pitt-7's federal and state antitrust claims in tandem under federal antitrust law standards. *See* Okla Stat. Ann. tit. 79, § 212 (stating that "the provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto") (footnote omitted). Under the essential facilities (or "bottleneck") doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). There are "four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.* at 1520. The district court held that Pitt-7 had failed to establish either the first or second element, and therefore dismissed the claim.

Regarding the first prong, the district court held that Pitt-7 "cannot establish that [McAlester] is a monopolist for purposes of the essential facility doctrine." Aplt's App. at 1108. Three facts persuade us to agree. First, Pitt-7 has represented in filings to the federal government that it has "a suitable available alternative water supply" to McAlester.[8]

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[8] Aplt's App. at 819 (Brief in Support of Motion of Defendants City of McAlester and the McAlester Public Works Authority for Partial Summary Judgment (Statement of Undisputed Facts), filed March 30, 2001); *id.* at 849 (Plaintiff's Response to McAlester's

Second, Pitt-7 has conceded that there exist other water treatment plants besides McAlester's in Pittsburg county and its environs. Aplt's App. at 939 (Dep. of William Hegdale, former Pitt-7 Board member, dated May 21, 1999). Third, Pitt-7 has stated that it could duplicate the facility operated by McAlester by constructing its own collection and treatment facility by as early as April 2004. *See id.* at 850.

Because we conclude that the first prong was not satisfied, we need not address the other required elements of the essential facilities test. We conclude that the district court correctly dismissed Pitt-7's antitrust claims.

III. CONCLUSION

We hold that the district court (1) erred in concluding that it lacked jurisdiction under the Rooker-Feldman doctrine; (2) erred in applying issue preclusion, claim preclusion, and full faith and credit; (3) did not err under the law of the case; (4) erred in part in applying the statute of limitations; (5) erred in its application of § 1926; and (6) did not err in dismissing Pitt-7's claims for injunctive relief under 7 U.S.C. § 1926, federal antitrust laws, and state antitrust laws. We therefore AFFIRM IN PART, REVERSE IN PART, AND REMAND TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Motion for Partial Summary Judgment (Response to McAlester's Statement of Undisputed Facts), filed April 13, 2001).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 02-7080

[Filed October 17, 2003]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff-Appellant,

v.

CITY OF McALESTER, a municipality, and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust,
Defendants-Appellees.

and

KENNETH W. SHERILL; LINDA F. SHERILL; BAR-19; HUNTSMAN EDISON FILMS CORPORATION, successor to Blessing Corp., d/b/a Edison Plastics; MIG, INC.; SOUTHEAST OKLAHOMA BOX COMPANY; TRI-CAT, INC.; SIMMONS POULTRY FARMS, INC.; DENNIS DEFRANGE; TERRY KINYON; PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY;

THE BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF PITTSBURG; H. G.)
GILLIAM; BILL WEBBER; OBEN)
WEEKS; THUNDERCREEK GOLF COURSE)
TRUST AUTHORITY,)
Defendants.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JUDGES: Before HENRY, HOLLOWAY, and MURPHY, Circuit Judges.

HENRY, Circuit Judge

The Pittsburg County Rural Water District Number 7 (Pitt-7) is a rural county water association in Oklahoma. The City of McAlester (McAlester) is a municipality in Oklahoma. Both Pitt-7 and McAlester are subdivisions of the State of Oklahoma, and both are water providers. Pitt-7 sued McAlester and a number of other entities under: (1) 42 U.S.C. § 1983, based on the claim that the defendants violated Pitt-7's exclusive right under 7 U.S.C. § 1926 to provide water to customers within the protected area; (2) federal antitrust law; and (3) state antitrust law. The district court, faced with a difficult set of issues, granted summary judgment for the defendants on certain § 1926 claims, dismissed certain other § 1926 claims, and dismissed Pitt-7's federal and state antitrust claims. For the reasons detailed below, we affirm in part, reverse in part, and remand.

I. BACKGROUND

A. 7 U.S.C. § 1926

In 1961, Congress amended 7 U.S.C. § 1926(a) to authorize the United States Farmer's Home Administration (FMHA) to make loans to nonprofit water service associations for "the conservation, development, use, and control of water."[1] Congress enacted 7 U.S.C. § 1926(b), in turn, to govern the terms of federal loans made to those associations. Section 1926(b) provides that, for an association indebted by a loan to the federal government under the statute, "the service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

B. The Board of County Commissioners of Pittsburg County, Pitt-7, the Loan from the FMHA, and McAlester

In 1963, Oklahoma lawmakers responded to Congress's 1961 amendment of 7 U.S.C. § 1926 by enacting a statute that "authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which they are established." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1194 (10th Cir. 1999) (citing Okla. Stat. Ann. tit. 82, § 1324.10(A)(4)). In

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[1] FMHA loans are now administered by the United States Department of Agriculture. *See* Pub. L. No. 103-354 (1994)). For the sake of simplicity, we refer to the creditor entity as the FMHA throughout the opinion.

1966, the Board of County Commissioners of Pittsburg County, Oklahoma (importantly, as will be seen later, an entity distinct from Pitt- 7), incorporated Pitt-7 to "develop[ ] and provide an adequate rural water supply . . . to serve and meet the needs of rural residents within the territory of the district." Okla. Stat. Ann tit. 82, § 1324.3.

In 1967, Pitt-7 first took advantage of the availability of the federal loans by borrowing $300,000 from the FMHA. Pitt-7 remained continuously indebted to the FMHA until February 24, 1989, when Pitt-7 repurchased its outstanding debt to the FMHA. On June 15, 1994, Pitt-7 once again entered into a loan agreement with the FMHA, borrowing $162,500. *See* Aplt's App. at 1005 (Mortgage, dated June 15, 1994).

From its inception, Pitt-7's territory included both land within McAlester's territorial limits and land near, but outside of, McAlester's territorial limits. For nearly three decades through June 30, 1999, Pitt-7 serviced these portions of its area with water purchased from McAlester. During the 1980s and 1990s, the relationship between Pitt-7 and McAlester became increasingly strained, apparently due to Pitt-7's demands that McAlester stop selling water in areas over which Pitt-7 held an exclusive service right under § 1926, McAlester's refusal to comply, and McAlester's threats to terminate water sales to Pitt-7.

C. The Complaint, the Petition for Deannexation, and the Termination of Water Sales by McAlester to Pitt-7

On March 25, 1997, Pitt-7 filed this action in federal district court, alleging violations of 7 U.S.C. § 1926(b) as enforced through 42 U.S.C. § 1983, federal antitrust law, and various Oklahoma state laws, including antitrust. McAlester responded in two ways.

First, on May 12, 1997, more than six weeks after Pitt-7 had filed this action, McAlester, several other local government entities, and landowners within Pitt-7's territory petitioned the defendant-appellee Pittsburg County Board of County Commissioners to deannex a portion of Pitt-7's territory.[2] The deannexed properties included those properties previously designated for service by Pitt-7 that are disputed in this case: Industrial Park, the Pittsburg County Regional Exposition Center, the Thundercreek Golf Course, the Sherrill property, and the Fender residence. The petitions documented complaints by McAlester and by landowners within Pitt-7's territory concerning customer service, capacity, and pricing. Pitt-7 moved before the Board to strike the petitions on the grounds that federal law - specifically § 1926 - preempted the requested deannexation.

Second, in June 1998, the McAlester City Council passed a motion instructing that Pitt-7 "be given written notice by the City Manager that effective June 30, 1999, the City Council would no longer enter into a contract for the purpose of selling water to them." Aplt's App. at 437 (Minutes of

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[2] Oklahoma law provides a mechanism for county commissioners to release designated lands from a water district. Under 82 Okla. Stat. tit. 1991, § 1324.21, "fifty-one percent . . . of the affected landowners may petition the county commissioners to release those lands from the district." Upon review of that petition, if the Board of County Commissioners determines that "the granting of the petition is to the best interests of the affected landowners and the affected district," *id.*, then the designated lands are released, or "deannexed" from the water district's territory.

McAlester City Council Session, dated June 23, 1998). As of June 30, 1999, McAlester terminated water sales to Pitt-7.

D. The Deannexation Order and the Resulting Decisions by the Oklahoma District Court and the Oklahoma Court of Civil Appeals

In June 1997, after a hearing at which counsel for Pitt-7 and for the petitioners each argued its side of the question, the Board voted to enter a Deannexation Order, stating that "it is in the best interests of the landowner, and in the best interest of [Pitt-7], that such lands be released from [Pitt-7]." Aples' Supp. App. at 355 (Certificate Releasing Lands from Rural Water Dist. No. 7, Pittsburg County, Oklahoma, dated Jun. 27, 1997). The Deannexation Order did not address the legality of the deannexation under federal law.

Under Oklahoma law, "an appeal lies from an order of the Board of County Commissioners to the District Court whenever their orders or decisions are of a judicial or quasi judicial nature." *Chandler Materials Co. v. Bd. of County Comm'rs of Tulsa County*, 1953 OK 71, 208 Okla. 189, 254 P.2d 767, 770 (Okla. 1953). Pitt-7 appealed the deannexation to the Oklahoma District Court in Pittsburg County, which exercised jurisdiction over the appeal and then dismissed the appeal as not properly perfected on the ground that Pitt-7's service upon the Pittsburg County Board of County Commissioners was "not sufficient" under Oklahoma law. Aples' Supp. App. at 459 (Order of the Oklahoma District Court for Pittsburg County, dated Sept. 15, 1997).

Pitt-7 then appealed the Oklahoma District Court's ruling to the Oklahoma Court of Civil Appeals (OCCA). The OCCA initially stated that "the deannexation decision at issue here . . . clearly determines land use and is a legislative function.

It therefore follows that the trial court was without jurisdiction to hear Pitt-7's appeal." Aples' Supp. App. at 252 (Memorandum Opinion No. 90,114, dated May 19, 1998).

Though the prevailing party, McAlester filed a Petition for Rehearing in the OCCA. The OCCA granted the petition, vacated its initial opinion, and held that the Oklahoma district court *did* properly exercise jurisdiction over Pitt-7's appeal, reasoning that "as a neutral tribunal whose decision affects the legal relation of particular lands vis-a-vis a corporate body, the board of county commissioners acts in a judicial or quasi-judicial capacity." *Id.* at 209 (Opinion on Rh'g, dated Sept. 8, 1998). The OCCA further held - with no discussion - that "the decision of the Board of County Commissioners releasing lands from the water district . . . is final and binding on [Pitt-7] even if based on an erroneous application of federal law" and that "it is not subject to collateral attack or an equitable challenge, such as declaratory relief." *Id.* at 210. The OCCA therefore affirmed the trial court's dismissal. *Id.* Pitt-7's subsequent petition to the Oklahoma Supreme Court for a writ of certiorari was denied.

E. The First Amended Complaint, the Various Motions Filed in the District Court, and the District Court's Orders

Meanwhile, Pitt-7's federal district court action remained pending. In May 1997, Pitt-7 filed a motion in the federal district court for partial summary judgment. In June 1997, while the proceeding before the Board was pending, Pitt-7 filed a First Amended Complaint in federal district court, adding as defendants the groups that had petitioned for deannexation and the Board of County Commissioners and also challenging the prospective deannexation. *See* Aplt's App. at 71-89 (First Amended Complaint, dated June 2, 1997). Subsequently, McAlester and the other defendants filed a series of motions for partial summary judgment and motions to dismiss.

Between November 1997 and September 1998, the federal district court issued a series of dispositive orders adjudicating the motions in favor of the defendants, ultimately either dismissing or granting summary judgment against Pitt-7 on all of Pitt-7's claims. *See* Aplt's App. at 143 (Judgment of the United States District Court, filed Oct. 15, 1998). Two of the district court's holdings in these orders are relevant to this appeal.

First, the district court examined the impact of Pitt-7's repurchase of its debt in 1989 and determined that any protections afforded Pitt-7 under § 1926(b) were extinguished along with its indebtedness to FMHA. Because Pitt-7 became indebted to FMHA again in 1994, the district court decided that the only viable claims at issue arose from actions taken by McAlester after June 15, 1994.

Second, the district court assessed whether Pitt-7 had made service "available" under § 1926. The district court found that Pitt-7 had "water lines in proximity to the properties," Aplt's App. at 139 (District Court Order, dated Sept. 30, 1998), but that Pitt-7 "must also demonstrate that the lines in place are of sufficient capacity to handle the water needs of the customers to be served at the present time." *Id.* "With each property referenced," found the district court, "Pitt- 7 will require the customer to pay for an extension to its existing water lines in order to provide service." *Id.* Based on these findings, the district court determined that Pitt-7 "has not made service available to the disputed areas and is, therefore, not entitled to § 1926(b) protection." *Id.* at 140.

F. This Court's May 22, 2000 Order & Judgment

On Pitt-7's appeal of the district court's orders, a unanimous panel of this court reversed. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 2000 U.S. App. LEXIS 8838, 2000 WL 525942 (10th Cir. May 2, 2000). In an Order & Judgment, we held that the fact that Pitt-7's debt was satisfied in 1989 did not extinguish otherwise valid claims for violations of Pitt-7's § 1926 rights during the period of indebtedness. We stated that to hold otherwise "'would defeat the purpose of [§ 1926(b]) because a water association which repurchased . . . its debt but which otherwise met the statutory requirements would have no recourse for encroachments that occurred or began while it was indebted to the government.'" 2000 U.S. App. LEXIS 8838 at **3 (quoting *Sequoyah*, 191 F.3d at 1200) (brackets and ellipses in original). We also held that the district court employed the test for determining whether Pitt-7 had made service "available" in "an inappropriately restrictive manner" because the district court did not consider service that could have been made available in a reasonably short time.2000 U.S. App. LEXIS 8838 at *4. The Order and Judgment declined to reach an array of issues, including the question of whether Pitt-7's § 1926 rights over the deannexed territory survived the deannexation, and remanded the case "for further proceedings consistent with this Order and Judgment." *Id.* On remand, the case was reassigned by the United States District Court for the Eastern District of Oklahoma to a different district court judge (from Burrage, J. to Payne, J.).

G. The Second Amended Complaint

In January 2001, Pitt-7 filed a Second Amended Complaint. The Second Amended Complaint summarized the proceedings before the Pittsburg County Board of County

Commissioners, the state court, the federal district court, and this court, and added the now finalized deannexation to the items complained of in the suit. The Second Amended Complaint alleged causes of action for violation of: (1) 42 U.S.C. § 1983 under 7 U.S.C. § 1926; (2) federal antitrust laws; and (3) state antitrust laws. As for remedies, the Second Amended Complaint sought a declaratory judgment on the City's right to sell water in Pitt- 7's territory, a declaratory judgment clarifying the various interested parties' rights and legal relations, multiple injunctions relating to the land areas deannexed, an injunction requiring McAlester to provide water to Pitt-7, and a declaratory judgment stating that the deannexation was unlawful.

H. The District Court's Order on Remand

On June 7, 2002, the district court issued an order rejecting all of Pitt-7's claims. That order granted summary judgment for McAlester and the other defendants on Pitt-7's § 1983 claims based on the alleged violation of 7 U.S.C. § 1926 and dismissed Pitt-7's claim for injunctive relief under § 1926, federal antitrust, and Oklahoma antitrust law. For purposes of understanding the district court's order, the water customers consist of three groups:

> Group 1: those customers McAlester first served during the first period of indebtedness, July 3, 1967 to February 24, 1989;
>
> Group 2: those first served between February 24, 1989 and June 15, 1994, when Pitt-7 was not in debt to the federal government;

> Group 3: those first served after the June 15, 1994 federal loan, when Pitt-7 incurred its latest debt to the federal government.

Of these three customer groups, the claims arising from Groups 1 and 3 are the focus of the appeal. Regarding Group 1 customers, the district court concluded that Pitt-7's § 1926 claims involving those customers were time-barred. The district court reasoned that a two-year statute of limitations applied and that since the "instant case was filed March 25, 1997 . . . all alleged encroachments occurring prior to March 25, 1995 are barred by the statute of limitations." *Id.* at 1101-02 (Dist. Ct. Order, filed June 7, 2002, at 5.). As discussed below, we affirm this conclusion.

Regarding Group 3, the district court found that all properties on which McAlester was serving water to customers as of the beginning of the period (all but one of the properties at issue) "do not fall within [Pitt-7's] § 1926(b) protected territory." *Id.* at 1101 (Dist. Ct. Order at 5). The district court reasoned that "when a municipality is serving water to a property prior to a rural water district's FMHA loan date, the rural water district has no right to serve water to that property, and thus [is entitled to] no 1926(b) protection." *Id.* at 1101. In addition, the district court held that "application of Section 1926(b) protection to customers that were served by the City prior to the June 1994 loan date would constitute an unconstitutional taking." *Id.*

As for the § 1926 claims based on sales to customers in the deannexed area, the district court rejected those claims by Pitt-7 on three independent grounds: (1) that the Rooker-Feldman doctrine bars the district court from exercising jurisdiction over the claim; (2) that "exercise of subject-matter jurisdiction to review the Board's deannexation order is also barred by res judicata, collateral estoppel, claim and issue preclusion, and the Full Faith and Credit Act," *id.* at 1104 n.5; and (3) that "state law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b)." *Id.* at 1105. As detailed below, we affirm in part and reverse in part the district court's holdings concerning claims arising from sales to Group 3 customers.

II. DISCUSSION

Overview

Our review of the district court's ruling proceeds in six parts, (A)-(F). Part (A) holds that the district court erred in concluding that it lacked jurisdiction under the Rooker-Feldman doctrine. Part (B) analyzes the application of issue preclusion, claim preclusion, and full faith and credit to this case, and holds that the district court erred to the extent it held that each of those doctrines barred Pitt-7's suit. In Part (C), we hold that the district court did not violate the law of the case. Part (D) holds that the district court erred in part in applying the applicable statute of limitations. In Part (E), we discuss 7 U.S.C. § 1926 in some detail and hold that the district court erred in its application of that statute. Finally, Part (F) analyzes the district court's dismissal of Pitt-7's claims for injunctive relief under § 1926, federal antitrust laws, and state antitrust laws to compel McAlester to sell water to Pitt-7 and holds that the dismissal was not error.

A. Jurisdiction and Rooker-Feldman

The district court held that due to the proceedings in the Oklahoma courts, Pitt-7 is precluded by the Rooker-Feldman doctrine "from challenging the validity of the final state administrative rulings that removed the [denannexed area] from [Pitt-7's] territory." Aplt's App. at 1104. "The Rooker-Feldman doctrine is a jurisdictional prohibition." *Kenman Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir. 2002) (emphasis in original). We note that this court has previously exercised jurisdiction in this case. Further, our earlier decision acknowledged, and was decided subsequent to, the county and state court proceedings that were the basis of the district court's Rooker-Feldman jurisdictional holding on remand and are the basis of McAlester's jurisdictional arguments on appeal. Nonetheless, we have an ongoing duty to ensure that our jurisdiction is proper; the right to challenge jurisdiction is not subject to waiver. We review the district court's holding regarding subject matter jurisdiction de novo. *See id.* at 473.

Subject matter jurisdiction generally does not vanish once it properly attaches. *See Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."). There are exceptions to this general rule, although none apply to this case. For example, mootness will end jurisdiction where a controversy no longer exists. *See Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). But mootness has not divested the federal courts of jurisdiction in this case; the controversy is alive and well. And, as we now discuss in detail, the proceedings before the Pittsburg Board of County Commissioners concerning deannexation and the subsequent Oklahoma state court decisions did not divest the federal district court of jurisdiction under the Rooker-Feldman doctrine.

In this case, when Pitt-7 filed its initial Complaint in March 1997, the federal district court possessed valid federal question jurisdiction over the federal law claims arising under 42 U.S.C. § 1983, 7 U.S.C. § 1926, and federal antitrust laws. *See Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (reaffirming that a case arises under federal law when "'federal law creates the cause of action or . . . the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law'") (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1986)). The federal district court also had supplemental jurisdiction over the pendent state law antitrust claims to the extent the federal claims survived legal challenge and the district court exercised its discretion to exercise supplemental jurisdiction. *See Chicago*, 522 U.S. at 177 (stating that because the district court had original jurisdiction over the plaintiff's claims arising under federal law, the district court "thus could exercise supplemental jurisdiction over the accompanying state law claims so long as those claims constitute 'other claims that . . . form part of the same case or controversy.'") (quoting 28 U.S.C. § 1367(a)). The jurisdictional question we must resolve is whether, under the Rooker-Feldman doctrine, the proceedings in the Pittsburg Board of County Commissioners and the Oklahoma state courts subsequent to the commencement of the federal action operated to divest the federal district court of jurisdiction over this action.

By federal statute, "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari." 28 U.S.C. § 1257(a). The negative inference from this statutory authorization is that "federal review of state court judgments can be obtained only in the United States

Supreme Court." *Kenman*, 314 F.3d at 473 (internal quotation marks omitted). Thus, "Rooker-Feldman precludes a party losing in state court from seeking what in substance would be appellate review of a state judgment in a United States district court, based on the losing party's claim that the state court judgment itself violates the loser's federal rights." *Id.* (internal brackets, ellipses and internal quotation marks omitted).

The Supreme Court has applied the Rooker-Feldman jurisdictional bar to two categories of claims, those (1) actually decided by a state court, *see Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415, 44 S. Ct. 149, 68 L. Ed. 362 (1923); or (2) "inextricably intertwined" with a state court judgment, *see Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 n.16, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). Plainly, the merits of Pitt-7's claims for relief based on alleged violations of federal water rights law under 7 U.S.C. § 1926 and federal antitrust law were not actually decided by the Oklahoma district court, which performed no merits analysis and dismissed Pitt-7's appeal due to defective service of process. Whether Pitt-7's federal court claims are "inextricably intertwined" with the Oklahoma state court's judgment is the question that we must resolve.

To apply the "intextricably intertwined" standard, we ask "'whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.'" *Kenman*, 314 F.3d at 476 (quoting *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996)). "In other words, we approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress." *Kenman*, 314 F.3d at 476 (emphasis omitted). If it did, Rooker-Feldman deprives the federal court of jurisdiction; if it did not, Rooker-Feldman provides no bar.

Applying that standard, Pitt-7's claims do not result from the state court judgments dismissing, and then affirming that dismissal of, Pitt-7's appeal of the Board of County Commissioners' deannexation for failure to perfect the appeal with proper service. Rather, Pitt-7's claims of alleged injury arise from (1) sales by McAlester to customers that were within Pitt-7's territorial boundary as of the June 1994 loan from the federal government, when Pitt-7 argues that the protections of 7 U.S.C. § 1926 attached; (2) the specter of McAlester refusing to sell water to Pitt-7 in alleged violation of § 1926 and federal and state antitrust laws; and (3) the act of deannexation by the Board of County Commissioners in alleged violation of Pitt-7's § 1926 rights. The remedies Pitt-7 seeks - damages, an injunction, and a declaratory judgment - are not dependent on an overturning in form or substance the state district court's dismissal of Pitt-7's appeal of the deannexation order or the OCCA's affirmance of that decision.

The timing of the deannexation proceedings corroborates this notion: with the exception of the deannexation, which had not yet occurred at the time of the filing of the Complaint and First Amended Complaint, the actions of the defendants that formed the basis of both iterations of the complaint had all been completed prior to the deannexation proceedings. The core of Pitt-7's claim, even as pleaded in the Second Amended Complaint, which was filed subsequent to the deannexation, is that McAlester has for years been selling water to certain customers that Pitt-7 claims it has the exclusive right to service under 7 U.S.C. § 1926, an argument the merits of which we address later in this opinion. We thus hold that the Oklahoma state court proceedings provide no bar to Pitt-7's claims under Rooker-Feldman. *Accord Kenman*, 314 F.3d at 477 (holding that the claim was barred in part because the plaintiffs sought "monetary damages attributable to losses they sustained as a result of being forced - by state court order - to remove magnesium from their Union City storage facility").[3]

B. Preclusion

In addition to finding Pitt-7's claims barred by the Rooker-Feldman doctrine, the district court held that its "exercise of subject-matter jurisdiction" is also barred by (1) issue preclusion, (2) claim preclusion and (3) the Full Faith and Credit Act. Aplt's App. at 1104 n.5. As we now discuss, the district court erred in its application of these three preclusion doctrines.[4]

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[3] *See also* Charles Wright and Arthur Miller, 18 B Fed. Prac. & Proc. § 4469.1 (2003) ("A decision not on the merits also does not oust federal jurisdiction to decide on the merits."); *Whiteford v. Reed*, 155 F.3d 671, 674 (3d. Cir. 1998) ("This court has consistently held that where a state action does not reach the merits of a plaintiff's claims, then Rooker-Feldman does not deprive the federal court of jurisdiction.").

[4] We note also that unlike Rooker-Feldman, none of these doctrines goes to "jurisdiction" as the district court phrased it. Rather, preclusion doctrines provide affirmative defenses once a court exercises jurisdiction over a civil action, and they are subject to waiver where not timely raised. *See, e.g.*, *Horwitz v. State Bd. of Med. Exam'rs of State of Colo.*, 822 F.2d 1508, 1512 (10th Cir. 1987).

1. Issue Preclusion

We apply Oklahoma state law to determine the preclusive effect, if any, of the Pittsburg County and Oklahoma proceedings on this federal court action. *See McFarland v. Childers*, 212 F.3d 1178 at 1185 (10th Cir. 2000). "Under Oklahoma law, 'once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate the issue in a suit brought upon a different claim.'" *Id.* at 1185 (quoting *Fent v. Okla. Natural Gas Co.*, 1994 OK 108, 898 P.2d 126, 133 (Okla. 1994)). Here, none of the issues disputed in this federal case were actually decided by the Oklahoma state courts or necessary to their judgments; the state court rulings were essentially limited to determining the propriety of service by Pitt-7 in attempting to perfect its appeal of the deannexation. Thus, under issue preclusion doctrine, the Oklahoma state courts' rulings do not bar Pitt-7's claims in this action.

Regarding whether issue preclusion flowed directly from the Pittsburg County Board of Commissioners' deannexation order, we note initially that the Board *was* sitting as a quasi-judicial body. Regardless, though, of the resolution of that question, the Board's order does not preclude Pitt-7's claims in this case because it did not resolve the merits of any of the § 1926, federal or state antitrust claims at issue in this action. The Board merely found that the statutory standard for deannexation--that "the granting of the petition is to the best interests of the affected landowners and the district," Okla. Stat. Ann, tit. 82, § 1324.21 - was satisfied, and the Board thus granted the deannexation petition. *See* Aples' Supp. App. at 355 (Certificate Releasing Lands, issued Jun. 27, 1997). In contrast, the questions before us concern primarily the legality under federal law of sales by McAlester before and after the deannexation to customers within Pitt-7's territorial border as it stood on June 15, 1994, the date Pitt-7 entered into an FMHA loan. Accordingly, issue preclusion flows from neither the proceedings before the Board nor the proceedings before the Oklahoma courts to bar Pitt-7's claims in this case.

2. Claim Preclusion

We next analyze whether, under Oklahoma law, the doctrine of claim preclusion bars Pitt-7's claims in this case. We consider the alleged preclusion of both the deannexation order and the subsequent state court appeal dismissed for lack of jurisdiction. Under Oklahoma law (which does not differ importantly from federal law in its treatment of claim preclusion), "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised *in that action.*" *Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, 796 P.2d 276, 283 n.27 (Okla. 1990) (emphasis in original). The question then is whether the claims raised by Pitt-7 in this action could have been raised and adjudicated on the merits in the proceedings before the Pittsburg Board of County Commissioners and the subsequent appeal of the deannexation Order to the state courts. We conclude that they could not have been.

The administrative proceeding at issue here - the deannexation proceeding - was one of quite limited substantive and remedial scope. Although a party may, as Pitt-7 did, file a petition in such a proceeding opposing deannexation on the ground that deannexation would violate federal law, the applicable standard in such a proceeding is not one established by federal law. Rather, the issue is whether Oklahoma's statutory standard for deannexation is met. Unlike Oklahoma district courts, the Board is not a court of general jurisdiction. Rather, the Board is a state-created agency with a narrow and specific jurisdiction when it comes to water districts, determining whether "the granting of the petition is to the best interests of the affected landowners and the district." Okla. Stat. Ann., tit. 82, § 1324.21. That determination is a fact-based, political, and policy-based calculus; it is not on its face one requiring, beyond that one judgment, application of federal or state law.

Thus, in the state administrative proceeding, Pitt-7 could not have "raised" - in the sense of lodging a complaint of law and seeking a legal or equitable remedy - the § 1926, federal antitrust, or Oklahoma antitrust claims at issue in the current suit. Under these circumstances, ordinary claim preclusion principles would not prevent the later assertion of a § 1983 claim (or any other beyond the competence of the Board of County Commissioners) following the Board's determination, even for a claim based on the same set of transactions that led to the deannexation proceeding. *See Dority v. Green Country Castings Corp.*, 1986 OK 67, 727 P.2d 1355, 1360 (stating that "the Restatement (Second) of Judgments [§ 83(3) (1982)] withholds res judicata effect from an agency's adjudicative decision if pursuit of a related claim in another tribunal would not disturb 'the scheme of remedies affordable by the administrative tribunal'"); Restatement (Second) of Judgments § 26(1)(c) (1982) (noting that claim preclusion is inapplicable where a plaintiff is "unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the [administrative tribunal]").

Moreover, the Supreme Court has recognized that "Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts," and that "in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts." *Allen v. McCurry*, 449 U.S. 90, 99, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (internal citation and internal quotation marks omitted). Section 1983 was enacted "to afford a federal right in the federal courts." *Monroe v. Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), overruled on other grounds, *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). "There is no support in § 1983's legislative history for a conclusion that, contrary to traditional claim preclusion principles, an adjudication in a state administrative tribunal of limited jurisdiction should preclude a later § 1983 action in federal court." *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 684 (4th Cir. 1994); *see also Haring v. Prosise*, 462 U.S. 306, 322 n.11, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) ("We fail to understand how [judicial economy] interests justify the adoption of a rule that would bar the assertion of [federal law] claims which have never been litigated."); *Frazier v. King*, 873 F.2d 820, 824 (5th Cir. 1989) (concluding that a rule of claim preclusion "would encourage plaintiffs to bypass administrative proceedings in order to preserve their claims under § 1983"). Indeed, due to Congress's desire to provide a federal forum for the vindication of federal rights, § 1983 contains no exhaustion requirement. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

It was therefore wholly proper for Pitt-7 to initiate this federal court action in March 1997 to attempt to vindicate its federal § 1926 and antitrust and pendent state antitrust claims in a federal forum without any predicate state proceedings. Pitt-7 *could* have filed a § 1983 action in state court alleging the § 1926 and antitrust claims at issue in this case. *See, e.g.*, *Hondo, Inc. v. Sterling*, 21 F.3d 775, 780 (7th Cir. 1994) (noting that the plaintiffs in that case "could have brought a

§ 1983 claim in state court"). However, as was its right under § 1983, Pitt-7 chose a federal forum to vindicate its federal rights.

Accordingly, we conclude that the district court erred in applying claim preclusion from the Oklahoma proceedings to this case. We turn now to review the district court's full faith and credit holding.

3. Full Faith and Credit

A judgment of a state court must be accorded "the same full faith and credit in every court within the United States . . . as [it has] by law or usage in the courts of such State.'" *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1534 n.2 (10th Cir. 1996) (quoting 28 U.S.C. § 1738). As noted above, regarding "the decision of the Board of County Commissioners releasing lands from the water district," the OCCA held that "that decision is final and binding on the water district even if based on erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief." Aples' Supp. App. at 210. Thus, the district court was (and is on remand) bound under the full faith and credit statute not to overturn the Board's deannexation.

However, contrary to the district court's holding, the full faith and credit statute does not bar the various claims and remedies sought by Pitt-7 other than striking the deannexation order: neither the Board nor the Oklahoma courts made any holdings on the § 1926 and antitrust claims brought in the instant suit by Pitt- 7, nor did any of their judgments foreclose any of the additional remedies sought by Pitt-7. Nor, as we discuss below in our analysis of the merits of Pitt-7's § 1926 claims, did the deannexation order lessen Pitt-7's § 1926 rights. Thus, the district court erred to the extent it held that the claims filed by Pitt-7 were barred by full faith and credit.

C. Law of the Case

Pitt-7 argues that the district court's rulings on both the statute of limitations of the § 1926 claim and the merits of the § 1926 claim violated the law of the case. "The 'law of the case' doctrine requires every court to follow the decisions of courts that are *higher* in the judicial hierarchy." *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993) (emphasis supplied). "The doctrine applies to issues previously decided, either explicitly or by necessary implication." *Id.* "When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." *Id.* The law of the case doctrine is "not an inexorable command but a rule to be applied with good sense." *Mason v. Texaco, Inc.* 948 F.2d 1546, 1553 (10th Cir. 1991) (internal quotation marks omitted). It is "a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Id.* (quoting *United States v. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 94 L. Ed. 750 (1950)).

Applying those standards, we hold that law of the case did not bar the district court's rulings on remand. Most significantly, nothing in the district court's ruling violated this court's previous Order & Judgment. Further, to the extent that the district court's ruling contradicted the previous district court rulings in this case, two factors counsel that we decline to apply the law of the case bar. First, the remand to the district court was general, stating only that the remand was "for further proceedings consistent with this opinion." Pitt-7, 2000 U.S. App. LEXIS 8838, 2000 WL 525992, at;

see also Mason, 948 F.2d at 1552 ("When the further proceedings are specified in the mandate the district court is limited to holdings such as are directed. When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate."). Second, "the purposes of 7 U.S.C. § 1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid - both purposes aimed at promoting the public interest." *Jennings Water, Inc. v. City of North Vernon, Indiana*, 682 F. Supp. 421, 426 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

We are therefore reluctant to exercise our discretion under the law of the case doctrine to avoid the merits in a § 1926 case. *Cf. id.* ("As a matter of law estoppel cannot be involved to subvert the application of a statute enacted in the public interest."). Accordingly, based on our discretion and sound policy considerations, we hold that none of the district court's rulings violated the law of the case.

D. Statute of Limitations

Because the district court's statute of limitations rulings present questions requiring the interpretation of federal statutory law, our review is de novo. *See Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm.*, 327 F.3d 1019, 1030 (10th Cir. 2003). Regarding the statute of limitations, Pitt-7 argues that the district court's holding that Pitt-7's § 1926 claims were time-barred conflicts with our decision in *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999).

Pitt-7's challenge to the district court's statute of limitations ruling is correct in part. As we now discuss, the district court's ruling that the claims based on the Group 1 customers (those first served by McAlester from July 3, 1967 to February 24, 1989) are time-barred was *not* inconsistent with *Sequoyah*; however, the ruling that § 1926 claims based on sales to Group 3 customers are time-barred *was* error under *Sequoyah*.

Regarding the claims for sales to Group 1 customers, *Sequoyah* did not reach either the issue of whether the claims were filed within the applicable statute of limitations or whether application of § 1926 would constitute an unconstitutional taking, the key bases for the district court's ruling on the § 1926 claims concerning Group 1 customers. We have noted that "§ 1983 claims are best characterized as personal injury actions," and that therefore "the forum state's personal injury statute of limitations should be applied to all § 1983 claims." *Blake v. Dickason*, 997 F.2d 749, 750 (10th Cir. 1993) (internal quotation marks omitted). The district court found, and the parties do not dispute, that a two-year statute of limitations applies to the § 1983 action, since that is the limitations period under Oklahoma law for a personal injury cause of action. *See* Aplt's App. at 1100 n.3; Okla. Stat. Ann. tit. 12, § 95. The original complaint in this case was filed on March 25, 1997. Thus, unless there is an applicable exception, all claims that accrued prior to March 25, 1995, are time-barred.

As noted above, it is settled under our previous Order & Judgment in this case that Pitt-7 was "not indebted to [the FMHA] from February 24, 1989, the date of the repurchase, to June 15, 1994, the date of the most recent loan, and [therefore] cannot claim § 1926 protection for this time period." *Pittsburg County*, 2000 U.S. App. LEXIS 8838, 2000 WL 525942, at **3. This necessarily means that no violations could have occurred during the period between February 24, 1989, the date the first loan was extinguished, and June 15, 1994, the date Pitt-7 next assumed obligations under the second loan agreement with the FMHA. Thus, the prior alleged violations could not have been "continuing" between 1989 and 1994; claims based solely on the pre-January 24, 1989 loan period became time-barred in 1991. This case is thus distinguishable from the case primarily relied on by Pitt-7, *Rural Water System # 1 v. City of Sioux Center, Iowa*, 967 F. Supp. 1483, 1508 (N.D. Iowa 1997) ("Actions that are alleged to be part of this series or pattern of wrongful acts have continued to occur until well within the limitations period."), *aff'd*, 202 F.3d 1035 (8th Cir. 2000). The district court thus did not err in dismissing those claims based on alleged pre-March 25, 1995 violations.

In contrast, the district court's ruling on claims based on sales to Group 3 customers was problematic. The district court held that "when a municipality is serving water to a property prior to a water district's FMHA loan date, the rural water district has no right to serve water to that property, and thus, no 1926(b) protection." Aplt's App. at 1101. However, faced with claims identical in structure to the continuing violation claims at issue here (i.e., claims that the municipality violated § 1926 by continuing to provide service during the protected period), *Sequoyah* authorized a cause of action by a water district that became indebted on an FMHA loan against a municipality where two conditions are satisfied. To prevail under *Sequoyah*, a water district must demonstrate for the property in question that during the protected period, it (1) was in debt to the federal government through a loan administered by the FMHA and (2) made service available. *Sequoyah*, 191 F.3d at 1201-05 (analyzing § 1926(b)). *Sequoyah* held that there existed disputed issues of material fact on the second prong of § 1926 and remanded the case. The fact that a municipality had provided service to those properties prior to the FMHA loan was no bar in *Sequoyah* to claims arising out of a city's service during the period of indebtedness.

Nothing in our prior Order and Judgment in this case was to the contrary. The district court's ruling conflicts with *Sequoyah* and was therefore error. Contrary to the district court's ruling, all § 1926 claims based on service by McAlester to customers within the limitations period were not otherwise barred by the fact that McAlester was serving those customers prior to the 1994 loan. We turn now to assess the merits of the district court's § 1926 rulings.

E. Did the district court err on the merits in granting summary judgment on the § 1926 claims?

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we draw all justifiable inferences in favor of Pitt-7 as the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). We review de novo the district court's determination that Pitt-7's § 1926(b) rights were terminated by the deannexation because it involves an interpretation of federal statutory law. *Seneca*, 327 F.3d at 1030. We analyze Pitt-7's § 1926 claim in two steps. First, we analyze the rights Pitt-7 possessed under § 1926 prior to the deannexation and conclude that the district court must make findings on remand as to whether Pitt-7 has satisfied the requisite elements. Second, we explain why, *if* Pitt-7 indeed has such § 1926 rights, those rights are enforceable against McAlester for post-deannexation sales to customers in the deannexed area.

1. Pitt-7's § 1926 rights from June 15, 1994 up to the Time of the Deannexation

We analyze whether Pitt-7 qualified for § 1926 rights by applying the standards we articulated in *Sequoyah*. That decision stated that "to receive the protection against competition provided by § 1926(b)[,] a water association must (1) have a continuing indebtedness to the FMHA and (2) have provided or made available service to the disputed area." 191 F.3d at 1197. The analysis on the first prong is fairly clear: from June 15, 1994 to the present, Pitt-7, undisputedly a water district, has been indebted to the federal government under a loan governed by the terms of § 1926.

On the second prong - whether Pitt-7 has provided or made service available - we are hamstrung in our analysis by the district court's failure to follow our instructions on remand. Our prior Order & Judgment in this case stated that "we . . . reverse and remand because the district court applied the wrong standard to determine whether the District made service available to the disputed customers." 2000 U.S. App. LEXIS 8838, 2000 WL 525942, at **4. The Order & Judgment noted that "the district court seems to have limited its examination to [Pitt-7's] ability to provide service today, when a water association meets the pipes-in-the-ground test by demonstrating that it has adequate facilities within or adjacent to the area to provide service to the area *within a reasonable time* after a request for service is made." *Id.* (internal quotation marks omitted) (emphasis in original). "At the very least," we stated, "the district court must address the reasonableness of the time estimates on remand." *Id.*

Unfortunately, the district court on remand did not "address the reasonableness of the time estimates," nor did the district court make *any* findings on whether Pitt-7 has made service available. Rather, the district court rested its conclusion that Pitt-7's § 1926 claims fail on its holding that the actions of McAlester are not those proscribed by § 1926. In doing so, the district court did not resolve the critical threshold question of whether Pitt-7 has made service available, the second prong of the § 1926 eligibility test. This omission was error, and on remand, we reiterate the instructions from our Order and Judgment that the district court make findings on this second prong of the § 1926 test. Specifically, the district court is instructed to, for the dates within the limitations period, analyze for each disputed property whether Pitt-7 made service "available."

2. Assuming Pitt-7 is Entitled to § 1926 Protections, May Pitt-7 Assert § 1926 Rights Against McAlester for Post-Deannexation Sales to Customers in the Deannexed Area?

We turn now to analyze whether, assuming that Pitt-7 was entitled to § 1926 protection, the district court correctly held that Pitt-7's § 1926 claim failed because "state law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b)." Aplt's App. at 1105. McAlester argues that the district court's ruling should be upheld because § 1926 does not apply to the acts of the defendants in this case, and that if § 1926 *is* read to apply to the acts of the defendants in this case, that application would violate the Constitution's spending clause, constitute an unconstitutional taking, and eviscerate states' regulatory protections against exorbitant pricing by rural water associations. We address each contention in turn.

a. Assuming Pitt-7 Is Entitled to Section 1926 Rights, Does Section 1926 Apply to McAlester's Conduct?

We first discuss the scope of § 1926 and then apply the statute to McAlester's conduct.

i. The Scope of Section 1926

Section 1926(b) provides that, for an association indebted to the FMHA, "the service provided or made available . . . shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b). In support of the district court's ruling, McAlester contends that under a literal reading of § 1926, its actions do not violate § 1926 because "to run afoul of Section 1926(b), a municipality must actively compete for the disputed water customer, by moving into the disputed territory through inclusion of the territory within its corporate boundaries." Aples' Br. at 44. Because McAlester did not do so, it maintains that it therefore could not have violated § 1926. Challenging the district court's ruling, Pitt-7 argues that such a literalistic reading of § 1926 is impermissibly narrow under our decisions.

We are persuaded by Pitt-7's argument. We have recognized that "Congress enacted 7 U.S.C. § 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing . . . water service or management . . . or essential community facilities to farmers, ranchers, and other rural residents." *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d

1211, 1214 (10th Cir. 1988). We have noted that "doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FMHA-indebted party seeking protection for its territory." *Sequoyah*, 191 F.3d at 1197. *See also North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FMHA- indebted rural water associations from municipal encroachments.").

Federal courts' broad construction of § 1926(b) reflects the two key goals underlying its enactment. The first was "to provide greater security for the federal loans made under the program." *Sequoyah*, 191 F.3d at 1196. By "protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system," *id.*, § 1926 protects the financial interests of the United States, which is a secured creditor of the water association, from reduction of the water association's revenue base. The second interest is the promotion of rural water development "by expanding the number of potential users of such systems, thereby decreasing the per-user cost." *North Alamo*, 90 F.3d at 915.[5]

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[5] The Senate Report of the bill that enacted § 1926 stated:

> This section would broaden the utility of this authority [of the Department of Agriculture to aid rural entities] somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of

We have noted that § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, *or similar means*." *Glenpool*, 861 F.2d at 1214. In light of this congressional mandate, where the federal § 1926 protections have attached, § 1926 preempts local or "state law [that] can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law." *Rural Water Sys. No. 1*, 967 F. Supp. at 1529, cited with approval in *Sequoyah*, 191 F.3d at 1202, 1202 n.8, 1203, and 1204 n.10.

To the extent that a local or state action encroaches upon the services provided by a protected water association, the local or state act is invalid. *See Title Ins. Co. of Minn. v. I.R.S.*, 963 F.2d 297, 300 (10th Cir. 1992) (noting that "under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, federal law preempts and invalidates state law which interferes with or is contrary to

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> financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, *the cost per user is decreased and the loans are more secure in addition* to the community benefits of a safe and adequate supply of running household water. A new provision has been added *to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.*

S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (emphasis supplied).

federal law."); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499, 1504 n.4 (10th Cir. 1994) ("'For the purposes of the *Supremacy Clause, the constitutional*ity of local ordinances is analyzed in the same way as that of statewide laws.'") (quoting *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)). There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).

ii. Applying § 1926 to McAlester's Conduct

If the district court determines on remand that Pitt-7 meets the two-part test for § 1926 protection regarding the deannexed area, the question becomes whether McAlester's sales to customers in the deannexed area purport to take away from Pitt-7's § 1926 protected sales territory. It is clear that they do. The deannexation, ordered after McAlester and others petitioned the County Board of Commissioners, was aptly titled "Certificate Releasing Lands from Rural Water District No. 7, Pittsburg County, Oklahoma;" it literally ordered, regarding the designated portions of Pitt-7's territory, that "such lands be released from [Pitt- 7]." Aples' Supp. App. at 354-55. McAlester's alleged sales in § 1926-protected territory, subsequent petitioning for the deannexation of a portion of Pitt-7's territory, and commencement of sales to customers in the deannexed area would violate "the congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, *or similar means*." *Glenpool*, 861 F.2d at 1214. To read § 1926 otherwise would be inconsistent with the understanding of the statute that we have previously adopted. When § 1926 protection attaches for a water district's service to a property within the water district's territory under the two-part test from *Sequoyah*, the water district has *exclusive* water service rights over that property until the water district's loan to the FMHA is paid off or the water district fails to make service "available" to the property in question. We thus hold that *if* Pitt-7 was entitled to § 1926 protection, the deannexation order is no bar to McAlester's liability and that McAlester's conduct falls within the conduct proscribed by § 1926.[6]

b. Spending Clause

The district court did not address the *Constitution's Spending Clause*. McAlester, however, argues that if § 1926 *is* read to apply in this case, that application would exceed the scope of the federal Spending Clause power.

We disagree. The *Spending Clause* provides that "the Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Section 1926 has been repeatedly upheld as a valid exercise of Congress's authority under the *Spending Clause*. *See, e.g., Glenpool*, 861 F.2d at 1215-16

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[6] Thus, the § 1926 protections, to the extent Pitt-7 qualified for such protections, were established as of June 15, 1994, and not altered by the deannexation. Federal, not state law, controls the geographic scope of the § 1926 protections, which attach as of the entry into the loan agreement and remain as long as the conditions for § 1926 protection discussed above - FMHA indebtednesss and service "made available" - are met. We therefore need not address the parties' dispute concerning whether under Oklahoma law, water districts may only sell water within the district's borders.

& 1215 n.1 (explaining that the conditions imposed by § 1926 on Oklahoma municipalities that enter into loan agreements with the FMHA fit comfortably within Congress's spending clause powers because "Oklahoma, through its authorized entity . . . bound itself and all its subdivisions, including [cities], to the conditions it had accepted").

Application of § 1926 to the facts of this case is similarly consistent with the limits of the *Spending Clause*. "Congress' spending power enables it to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Kansas v. United States*, 214 F.3d 1196, 1198 (10th Cir. 2000) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). There are "four general restrictions on Congress' exercise of power under the Spending Clause." *Kansas*, 214 F.2d at 1199. "First, Congress's object must be in pursuit of the general welfare." *Id.* (internal quotation marks omitted). "Second, if Congress desires to place conditions on the states' receipt of federal funds, it must do so unambiguously so that states know the consequences of their decision to participate." *Id.* "Third, the conditions must be related to the federal interest in the particular program. The required degree of this relationship is one of reasonableness or minimum rationality." *Id.* (internal citation and quotation marks omitted). "Fourth, there can be no independent constitutional bar to the conditions." *Id.* "The fourth restriction stands for the more general proposition that Congress may not induce the states to engage in activities that would themselves be unconstitutional." *Id.*

The only one of these factors seriously contested by McAlester is the second factor: whether Congress has placed conditions on the receipt of federal funds in loans to rural water districts "unambiguously." McAlester argues that if we apply § 1926 in this case, "the State of Oklahoma would have never had an opportunity to choose not to accept the funds that were borrowed by [Pitt-7] in 1994 . . . Congress will have failed to state the conditions imposed by Section 1926(b) with sufficient clarity." Aples' Br. at 48.

We disagree. The Oklahoma legislature formed the water districts so that the state, through the water districts, could avail itself of the loans made available through § 1926, i.e. "to borrow money from the federal government to accomplish the purposes for which they are established." *Sequoyah*, 191 F.3d at 1194. Given § 1926's text and the judicial decisions referenced above uniformly announcing and applying a rule of liberal construction to effectuate the statute's purposes, the State of Oklahoma and its subdivisions were on sufficient notice that through their *choice* to borrow money from the federal government, they agreed to abide by § 1926(b)'s proscriptions, including those against shrinking the protected rural water association's service area. We thus reject McAlester's attempt to save the district court's judgment by reference to limits under the Spending Clause.

c. Takings Clause

Next, McAlester argues that the district court was correct in concluding that "application of § 1926(b) protection to customers that were served by McAlester prior to the June 15, 1994 loan date would constitute an unconstitutional taking." Aples' Br. at 50.[7] We disagree. Application of 7

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[7] McAlester does not advance this argument regarding Group 3 customers, presumably because, since the § 1926 protections would have attached prior to the Group 3 customer sales, there were no customer relationships of McAlester's to "take."

U.S.C. § 1926 to Group 1 or Group 2 customers decisively does not constitute a taking; indeed, the federal government's loan of several hundred thousand dollars to Pitt-7 as a subdivision of the State of Oklahoma is the near-*opposite* of a taking.

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The aim of the Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Eastern Enters. v. Apfel*, 524 U.S. 498, 522, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (internal quotation marks omitted). When a regulation adjusts the benefits and burdens of certain economic action to promote the common good, such regulation may in *certain* circumstances effect a taking. *See id.* at 522-23.

A party challenging governmental action as an unconstitutional taking "bears a substantial burden." *Id.* at 523. "In light of that understanding," the Supreme Court has stated, "the process for evaluating a regulation's constitutionality involves an examination of the justice and fairness of the governmental action." *Id.* (internal quotation marks omitted). To aid lower courts engaging in such an examination, the Supreme Court has "identified several factors . . . that have particular significance: the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* (internal quotation marks omitted). Applying these three factors compels our holding that no taking is effected in this case by application of § 1926. First, as for economic impact, the regulation in question flowed from an agreement in which the federal government loaned

Pitt-7, a political subdivision of the State of Oklahoma, more than $160,000 to aid the water district's development, at an attractive fixed interest rate of five percent.

As for reasonable investment-backed expectations, under § 1926 and the judicial decisions construing that statute, the State of Oklahoma was on sufficiently clear notice that interference with the boundaries of a rural water association during the period that they were protected by § 1926 rights was precluded by law. To the extent McAlester invested in infrastructure on the assumption that § 1926 was no bar to sales in the deannexed portion, that assumption was not reasonable.

Finally, the character of the imposition of federal law on the state entities in particular confirms the reasonableness of requiring McAlester as a subdivision of the State of Oklahoma to comport with the conditions of § 1926. The requirements of § 1926 flow, not from legislative or executive fiat, but from the entry by a water district - a state subdivision - into an agreement to borrow money from the federal government. The State of Oklahoma was "ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Kansas*, 214 F.3d at 1203. "Offers of conditioned benefits," such as those available to capital-starved rural water associations through preferable loan terms from the federal government, "'expand rather than contract the options of the beneficiary class, and so present beneficiaries with a free choice.'" *Id.* (quoting Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1428 (1989)). In addition, the State of Oklahoma could end the restrictions imposed by § 1926 by paying off Pitt-7's loan and thus ending the period of indebtedness critical to § 1926 protection. We note also that the constraints imposed by § 1926 do not preclude McAlester from selling water.

Presumably, McAlester's facilities remain a source of significant revenue: we see no reason why McAlester may not sell water wholesale to Pitt-7 or to nearby suppliers, or retail to customers in non- § 1926-protected areas in the vicinity. For all of these reasons, we conclude that the district court erred in ruling that application of § 1926 to those customers first served by McAlester (Groups 1 and 2) would constitute a taking.

d. Regulation of Rural Water Districts

The district court read § 1926 not to apply to this case because, in its view, to apply § 1926 to the facts of this case "would limit [the] County Commissioner's ability to release and separate areas from a water district even when it was in the best interests of the landowners and the water district to do so." Aplt's App. at 1104-05. Similarly, McAlester advances the policy argument that if we decline to recognize the right of a local government to deannex portions of a rural water association protected by § 1926, no regulatory bar will remain to constrain § 1926-protected rural water districts from charging excessively high prices. Although the prospect of such a scenario *would* give us reason to pause, we do not find McAlester's parade of horribles an accurate depiction of the regulatory framework in place before, or after, our decision today.

McAlester relies on the argument in a dissenting opinion to our circuit's holding in *Rural Water Dist. No. 1, Ellsworth County, Kan. v. City of Wilson, Kan.*, 243 F.3d 1263 (10th Cir. 2001). The dissent in that case reasoned that rural water customers dissatisfied with high-cost water provided by the federally sanctioned monopoly water association could file under the Kansas analogue to Oklahoma's deannexation statute for "release of lands from the water districts service area." 243 F.3d at 1276 (Briscoe, J., concurring in part and dissenting in part).

However, rural water associations protected by § 1926 *are* subject to price restraints under the threat of losing their § 1926 protection. They are not free at their whim to price monopolistically. As we have stated, "even [if] a rural water district has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made, the cost of those services may be so excessive that it has *not made those services available* under § 1926(b)." 243 F.3d at 1271 (majority) (internal citations and quotation marks omitted) (emphasis supplied). "If the city can show that [the rural water district's] rates or assessments were unreasonable, excessive, and confiscatory," we stated, "then the water district has not made services available under § 1926(b)," and therefore is not entitled to § 1926 protection. *Id.*

We reaffirm this approach today. This manner of factoring in cost, in addition to being binding circuit law, is a sensible rule as a policy matter. We mitigate the tendency of monopolists to price exorbitantly by conditioning the right to earn the governmentally sanctioned monopolist status on the water association's employing prices that, even if high, are not prohibitive. The doctrine's aim is to help avoid the unattractive scenario of water remaining unavailable as a practical matter due to excessively high monopolistic pricing without legal recourse for consumers and with no additional market entry by a supplier in sight. We need not define what it means for a price to be "so excessive that it has not made the services available," for the purpose of § 1926 analysis, 243 F.3d at 1271; that is for the district court to determine on remand, perhaps with the benefit of expert witness testimony on the subject.

We thus reject the argument advanced by McAlester and embraced by the district court that, regardless of the terms of § 1926 agreed to by the State of Oklahoma through the entry into the loan agreement, we must out of deference to state regulatory prerogative refuse to apply § 1926. Such a view reflects "misplaced federalism concerns." *United States v. Welch*, 327 F.3d 1081, 1093 (10th Cir. 2003).

To recap our § 1926 substantive analysis, we hold, notwithstanding McAlester's arguments under the Spending Clause, the Takings Clause, and regulatory policy concerns, that the rights under 7 U.S.C. § 1926, to the extent they had vested, were not extinguished by the deannexation and are enforceable against McAlester's conduct. The district court erred in holding to the contrary.

Accordingly, we also reverse the district court's corollary ruling that Pitt-7 lacked standing to lodge claims relating to the Sherrill property, an issue we review de novo. *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). Given our analysis on the § 1926 claim, Pitt-7 has shown the necessary imminent threat of injury of its § 1926 rights to establish the requisite injury in fact for standing: Sherrill is an entity within the deannexed territory that has requested water service and has asserted that it has the right to deannex and receive water service from an entity other than Pitt-7.

We turn now to review the district court's dismissal of Pitt-7's claims for injunctive relief.

F. Did the District Court Err in Dismissing Pitt-7's Claim for Injunctive Relief to Prohibit McAlester from terminating water sales to Pitt-7?

Pitt-7 sought prospective injunctive relief against McAlester from terminating water sales to Pitt-7 on the grounds that such termination would violate § 1926(b), state antitrust laws, and federal antitrust laws. The district court dismissed Pitt-7's claims for injunctive relief. We review the district court's dismissal de novo. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). As we discuss below, the district court did not err in dismissing the claims for injunctive relief.

1. § 1926(b)

The district court held that "termination of wholesale water sales to [Pitt- 7] is not prohibited" by § 1926. Aplt's App. at 1109. On appeal, Pitt-7 argues that the purpose of § 1926 is to maintain the ability of the water district to serve its customers with prices kept relatively low through economies of scale and to ensure the security of the federal government's loan. Pitt-7 maintains that McAlester's refusal to sell undermines that purpose, for "to read a loophole into the absolute prohibition . . . and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of 1926(b)." Aplt's Br. at 54 (internal quotation marks omitted).

Although Pitt-7's argument is not without force, it is too far afield from § 1926's text or the decisional law applying § 1926 for us to embrace it. First, there is nothing in the statute's text concerning a water supplier's refusing to deal with a § 1926-protected water association. Second, even under the broad reading of § 1926 given by federal courts discussed above, the inquiry in § 1926 claims has focused on whether the defendant attempted an encroachment through interference with *boundaries* or by purporting to *compete* with the § 1926- protected water district within the protected territory. Refusal to sell water is clearly not interference with boundaries. Further, although such refusal might be characterized as anti-competitive behavior, it is encroachment through competition, not *anti*-competitive acts, that § 1926 bans.

Moreover, remedies *are* available to challenge unlawful refusals by a supplier to sell a product. To the extent, if any, that Pitt-7 has a claim concerning McAlester's refusal to sell water, that claim sounds in antitrust. *See*, *e.g.*, I ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), at 161 ("Vertical refusals to deal generally arise where a manufacturer refuses to do business with a distributor in the first instance or terminates an existing distributor. . . . Vertical refusals to deal have been challenged as unreasonable trade restraints under . . . the Sherman Act."). We therefore turn to Pitt-7's federal and state antitrust claims.

2. Antitrust Claims

Pitt-7 alleges violation of federal and Oklahoma antitrust laws on the theory that McAlester's refusal to sell water to Pitt-7 violates the essential facilities doctrine. The district court dismissed all of Pitt-7's claims for federal and Oklahoma law antitrust violations. The district court found that (1) McAlester was subject to state action immunity from suit on either the federal or state antitrust claim; and, in the alternative, that (2) the antitrust claims failed on the merits because Pitt-7 could not establish the elements necessary to sustain an essential facilities claim. We decline to address the state action immunity rulings because, as discussed below, Pitt-7's essential facilities claims fail on the merits.

We can comfortably address the merits of Pitt-7's federal and state antitrust claims in tandem under federal antitrust law standards. *See* Okla Stat. Ann. tit. 79, § 212 (stating that "the provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto") (footnote omitted). Under the essential facilities (or "bottleneck") doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). There are "four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.* at 1520. The district court held that Pitt-7 had failed to establish either the first or second element, and therefore dismissed the claim.

Regarding the first prong, the district court held that Pitt-7 "cannot establish that [McAlester] is a monopolist for purposes of the essential facility doctrine." Aplt's App. at 1108. Three facts persuade us to agree. First, Pitt-7 has represented in filings to the federal government that it has "a suitable available alternative water supply" to McAlester.[8]

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[8] Aplt's App. at 819 (Brief in Support of Motion of Defendants City of McAlester and the McAlester Public Works Authority for Partial Summary Judgment (Statement of Undisputed Facts), filed March 30, 2001); *id.* at 849 (Plaintiff's Response to McAlester's

Second, Pitt-7 has conceded that there exist other water treatment plants besides McAlester's in Pittsburg county and its environs. Aplt's App. at 939 (Dep. of William Hegdale, former Pitt-7 Board member, dated May 21, 1999). Third, Pitt-7 has stated that it could duplicate the facility operated by McAlester by constructing its own collection and treatment facility by as early as April 2004. *See id.* at 850.

Because we conclude that the first prong was not satisfied, we need not address the other required elements of the essential facilities test. We conclude that the district court correctly dismissed Pitt-7's antitrust claims.

III.CONCLUSION

We hold that the district court (1) erred in concluding that it lacked jurisdiction under the Rooker-Feldman doctrine; (2) erred in applying issue preclusion, claim preclusion, and full faith and credit; (3) did not err under the law of the case; (4) erred in part in applying the statute of limitations; (5) erred in its application of § 1926; and (6) did not err in dismissing Pitt-7's claims for injunctive relief under 7 U.S.C. § 1926, federal antitrust laws, and state antitrust laws. We therefore AFFIRM IN PART, REVERSE IN PART, AND REMAND TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

Motion for Partial Summary Judgment (Response to McAlester's Statement of Undisputed Facts), filed April 13, 2001).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 97-185-P

[Filed June 7, 2002]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,

v.

CITY OF MCALESTER, a municipality, and THE MCALESTERPUBLIC WORKS AUTHORITY, a public trust, et al.,
Defendants.

ORDER

Now before the court is Defendants' Motion for Partial Summary Judgment, Plaintiff's Response to said motion and Defendants' Reply. Additionally, the court has before it for consideration Plaintiff's Motion for Partial Summary Judgment, Defendants' Response to said motion and Plaintiff's Reply. Both parties argue the deannexation of certain properties and the statute of limitations are critical issues remaining to be adjudicated following the Tenth Circuit Court of Appeals decision in *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 211 F.3d 1279 (10th Cir. 2000)(unpublished). Additionally, the defendants, the City of McAlester and the McAlester Public Works Authority ("City"), contend the plaintiff's, Pittsburg County Rural Water District No. 7 ("District"), state and federal antitrust claims fail as a matter of law.

BACKGROUND

As set forth in the Tenth Circuit Court of Appeals decision, *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 211 F.3d 1279 (10th Cir. 2000) (unpublished), "the Board of County Commissioners of Pittsburg County, Oklahoma, incorporated the District on April 26, 1966 to 'develop [] and provid[e] an adequate rural water supply ... to serve and meet the needs of rural residents within the territory of the district.' Okla. Stat. Ann. tit. 82, § 1324.3. Oklahoma law authorizes districts to borrow money from the federal government. See Okla. Stat. tit. 82, § 1324.10(A)(4). In turn, the federal government makes loans available to districts pursuant to 7 U.S.C. § 1926(a)." Id.

"The District first took advantage of these federal loans, administered by the Farmer's Home Administration (FmHA) in 1967 by borrowing $300,000. The District remained continuously indebted to FmHA until February 24, 1989, when the District borrowed funds from the First National Bank and Trust Co. of McAlester, Oklahoma, in order to repurchase its outstanding debt to FmHA. Subsequent to repurchase, the notes were marked "SATISFIED IN FULL--FmHA". The District is once again indebted to FmHA pursuant to a loan obtained on June 15, 1994." Id.

Periods of indebtedness are important because § 1926(b) protects rural water districts indebted to FmHA from competition or other encroachments in their service area. The Tenth Circuit determined that based on the various dates of the District's loans, there were three critical periods: (1) the original period of the District's indebtedness, July 3, 1967 to February 24, 1989; (2) the period between February 24, 1989 and June 15, 1994; and (3) the period after June 15, 1994, when the District incurred its latest debt to FmHA. The Tenth Circuit ultimately held "Section 1926(b) protection does not extend ... to issuer repurchases when the underlying debt to the government is simultaneously canceled or retired." *Pitrsburg County* 211 F. 3d at 1279, *citing Sequoyah*, 191 F.3d at 1200. "The District's debt was discharged, in this case ... [t]herefore, the District was not indebted to FmHA from February 24, 1989, the date of the repurchase, to June 15, 1994, the date of the most recent loan, and cannot claim § 1926(b) protection for this time period." However, the Court also found encroachments during periods of indebtedness could still be actionable, if not barred by the applicable statute of limitations. *Pittsburg* at 1279 *citing, Sequoyah County Rural Water District No. 7 v. Town of Muldrow*, 191 F.3d at 1200-1201 (10th Cir. 1999).

The uncontroverted record reflects there are five properties at issue: (1) the Industrial Park;[1] (2) the Pittsburg

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[1] Courts addressing 7 U.S.C. § 1926(b) hav[illegible]owed a subdivision approach, treating subdivisions as a single unit for purposes of Section 1926(b) water-service rights. *See e.g., Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 962 (E.D.N.C. 1997)(using subdivision approach to determine Section 1926(b) protection); *North Alamo Water Supply Corp. v. City of San Juan, Texas*, 90 F.3d 910, 913 (5th Cir. 1996) (dispute between a rural water district and the City of San Juan over which

County Regional Exposition Center ("Expo Center"); (3) Thundercreek Golf Course ("Golf Course"); (4) the Sherrill Property; and (5) the Fender residence. Plaintiff's Second Amended Complaint alleges five causes of action: (1) violation of 42 U.S.C. § 1983; (2) declaratory judgment seeking a declaration regarding the City's right to sell water within the District's territory; (3) declaratory judgment injunction requiring the City to provide water to the District; (4) declaratory judgment relating to the Industrial Park and Expo Center deannexations ; (5) declaratory judgment relating to the Sherrill's deannexation[2]; and (6) declaratory judgment and injunction relating to the Golf Course deannexation.

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had the right to provide water services to five residential subdivisions); *North Shelby Water Co. v. Shelbyville Mun. Water and Sewer Comm'n*, 803 F. Supp. 15 (E.D.Ky. 1992)(addressed water service to the Brassfield and Meadows subdivisions); and *Water Works Disc. No. II of Tangipahoa Parish v. City of Hammond*, No. 86-0187, 1989 WL 117849 (E.D. La. Oct. 3 1989)(the court referenced the Westin Oaks Commercial Park, Hammond Industrial Park, and various residential subdivisions as one entity and not by their individual tenants or residents). Therefore, to the extent there are individual water users located within the Industrial Park, the Industrial Park shall be considered a subdivision for purposes of Section 1926(b) protection.

[2] It is undisputed the City has never sold water to Kenneth W. Sherrill and Linda F. Sherrill for delivery on their lands that are the subject of this action. As a result, the District has no action against the City for water sales to the Sherrills. It is also uncontroverted that there has been no final judgment concerning the deannexation of the Sherrills' property. Therefore, the court finds there is no case or controversy regarding this property.

DISCUSSION

Statute of Limitations

This action was filed by the District pursuant to 42 U.S.C. § 1983. However, because § 1983 contains no statute of limitations, the court must look to the most analogous state statute of limitations. *See*, *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988); *Wilson v. Garcia*, 471 U.S. 261, 280 (1985). "[T]he most analogous statute of limitations in Oklahoma is the two-year provision on claims for injury to the rights of another, not arising out of contract, and not hereinafter enumerated." *Meade* 841 F.2d at 1524.[3] The instant case was filed March 25, 1997. Therefore, all alleged encroachments occurring prior to March 25, 1995 are barred by the statute of limitations.

Specific Properties at Issue

When a municipality is serving water to a property prior to a rural water district's FmHA loan date, the rural water district has no right to serve water to that property, and thus, no 1926(b) protection. *See Rural Water System #1 v. Sioux Center*, 29 F.Supp.2d 975, 991-92 (N.D. Iowa 1998), *aff'd in part and rev'd in part on other grounds*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 121 S.Ct. 61 (2000). Application of Section 1926(b) protection to customers that were served by the City prior to the June 1994 loan date would constitute an unconstitutional taking.[4] The Fifth Amendment protects the property of states from appropriation by the federal government without "just compensation." *See United States v. Carmack*, 329 U.S. 230, 242 (1945), *reh'g denied*, 329 U.S. 834 (1947); *California v. United States*, 395 F.2d 261, 263 & n.4 (9th Cir. 1968). "This is true even when the property has been dedicated by the State to public use." *California*, 395 F.2d ar 264 & n.5.

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[3] Further, this court, by previous order, has already determined the applicable limitations period is two years. *See*, *Pittsburg County Rural Water Dist. No. 7 v. McAlester*, No. CIV-97-185-B, 1997 WL 835210, slip op., at *4 (E.D. 0kla., Nov. 26, 1997).

The Industrial Park was developed by the City in 1981, including installation of facilities for city-provided water. As part of its development, the City constructed water lines and other infrastructure to encourage private industrial development within the Industrial Park. The City has been selling water to occupants of the Industrial Park since 1984. Water service was initiated to the Golf Course on June 14, 1994. And the City first served the Fender residence on July 10, 1986. Because it is undisputed that the City was already serving the Industrial Park, the Fender Residence, and the Golf Course prior to the District's second period of FmHA indebtedness, these properties do not fall within the Section 1926(b) protected territory of the District.

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[4] Encroachments occurring prior to an issuer repurchase but during the term of indebtedness are actionable, if the cause of action is brought within the applicable statute of limitations. *Sequoyah County Rural Water District No. 7 v. Town of Muldrow*,191 F.3d at 1200-1201. In the instant case, the statute of limitations on the first period of indebtedness concluded, at the very latest, on February 24, 1991. The District was afforded no § 1926(b) protection during the interim period, February 24, 1991 through June 15, 1994. The June 15, 1994 loan began a new period of indebtedness and § 1926(b) protection. Thus, service had been provided to the affected customers before the protection arising from the June 15, 1994 loan became effective.

Therefore, the only remaining property at issue is the Expo Center. The Board of County Commissioner of Pittsburg County, Oklahoma ("Board"),entered orders on June 27, 1997, removing the Industrial Park and the Expo Center from the District's territory. These orders are final and binding on the District. Before the Board entered its orders deannexing the Industrial Park and the Expo Center from the District's territory, the District argued before the Board that federal law would prohibit the deannexations. The Board determined that it had the authority to enter the deannexation orders. Following a hearing on June 23, 1997, to consider whether deannexation was appropriate, the Board entered its June 23, 1997, deannexation orders, removing the Industrial Park and the Expo Center from the District's territory.

On July 15, 1997, the District filed an appeal in the District Court of Pittsburg County, Oklahoma. The District Court of Pittsburg County determined that the District's appeal was untimely. On September 15, 1997, the District appealed to the Oklahoma Court of Civil Appeals. The Oklahoma Court of Civil Appeals affirmed the District Court's dismissal of the District's appeal on September 8, 1998. In affirming the District Court's dismissal of the District's appeal, the Court of Civil Appeals held that "the appeal was properly dismissed" as untimely. The Court of Civil Appeals also held that "Pittsburg County Rural Water District No. 7 did not timely comply with the statutory requirements to bring an appeal from the decision of the Board of County Commissioners releasing the lands from the water district. That decision is final and binding on the water district even if based on an erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief." The Oklahoma Supreme Court denied certiorari on January 21, 1999.

The Rooker-Feldman doctrine bars an exercise of subject-matter jurisdiction to review the deannexation orders. *See Districrt of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (holding that no federal court shall entertain a collateral attack on a final state court judgment). The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts. *See Siegel v. LePore*, 234 F. 3d 1163, 1172 *(holding in the Florida election litigation, that ongoing appeals in the U.S. Supreme Court and Florida Supreme Court prevented the existence of a final judgment giving rise* to the *Rooker-Feldman concerns that would have barred the Eleventh Circuit from exercising jurisdiction over the Plaintiff's claims), reh'g denied*, 234 F. 3d 1218 (11th Cir. 2000).

The Rooker-Feldman doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to federal claims that are "inextricably intertwined" with a state court judgment. *Feldman*, 460 U.S. at 482 n.16, *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997). A federal claim is inextricably intertwined with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring). Therefore, the District is precluded from challenging the validity of the final state administrative rulings that removed the Industrial Park and the Expo Center from the District's territory.[5]

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[5] This Court's exercise of subject-matter jurisdiction to review the Board's deannexation orders is also barred by res judicata, collateral estoppel, claim and issue preclusion, and the Full Faith

The District argues, however, even if the deannexation were proper, it has no effect on an indebted association's § 1926(b) protected service area. Therefore, the remaining issue is whether post-deannexation water sales are prohibited.[6] Federal law determines the "territory" of a rural water association by reference to governing state law. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F. 3d 230, 234 (6th Cir. 1996)(emphasis added). In the recent case of *Rural Water and Sewer District No. 4 v. City of Coweta*, No. 96,679, 2002 WL 1067356 (May 2, 2002), the Oklahoma Supreme Court found the Board of County Commissioners is vested with the important duty of determining the boundaries of rural water districts based on Oklahoma statutory law governing the formation and deannexation from rural water districts. In that case, the Water District argued that Okla. Stat. tit. 82, § 1085.36, the state equivalent of 7 U.S.C. § 1926(b), "viewed in conjunction with its 1992 loan agreement, prevents the release and separation of the Disputed Area from the Water District and prevents the City of Coweta from providing it with water and sewer services." Id. at *3. The Oklahoma Supreme Court disagreed and held:

> The Water District's proposed territorial approach to application of section 1085.36 would not, [] be consistent with the public policy of encouraging and promoting the development of water and sewer facilities. Okla. Stat. tit. 82, § 1085.31 (2001). It

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and Credit Act. *See Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984) and 28 U.S.C. § 1738.

[6] The undisputed facts demonstrate that the City sold no water to the Expo Center prior to the deannexation. Therefore, the disputed time period would be between June 23, 1997, the date of the deannexation orders, until the time of judgment.

> would limit County Commissioner's ability to release and separate areas from a water district even when it was in the best interests of the landowners and the water district to do so. Additionally, a territorial approach would impose provisions of a water district's loan agreement with the Water Resources Board on non-customer landowners who are not parties to the contract. Finally, such an approach would result in the granting of an exclusive right to provide water and sewer services within the geographical boundaries of a water district in contravention of Article V, section 51, of the Oklahoma Constitution and this Court's holding in Commanche County Rural Water District No. 1 v. City of Lawton, 501 P.2d 490 (Okla. 1972).

Rural Water District No. 4 v. City of Coweta, 2002 WL 1067356, *4.

Likewise, this court finds state law adjustment of the boundaries of a rural water district does not fall within the categories of actions that are prohibited by Section 1926(b). By its terms Section 1926(b) does not remove the authority of state administrative agencies to regulate the boundaries of rural water districts during the term of a federal loan. Section 1926(b) prohibits the curtailment of service through the "inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area." 7 U.S.C. § 1926(b) (emphasis added). The term "inclusion" is defined as "the act of including." *Webster's Third New International Dictionary* 1143 (1976 ed.). In turn, the verb "to include" means to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle." Id. The term "granting," or "to grant," means "GIVE, BESTOW, CONFER ...to make a conveyance of: give the possession or title of esp. by a deed or formal writing." Id. at 989.

Federal courts that have interpreted Section 1926(b) have summarized these proscribed actions with the term "encroachment." *See, e.g., North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir. 1996) (using the Term "encroachment"), *cert. denied*, 519 U.S. 1029 (1996). The term "encroachment" is defined as "the act or action of encroaching." *Webster's Third New International Dictionary* 747 (1976 ed.). The verb "to encroach" is then defined to mean "to enter by gradual steps or by stealth into the possession or rights of another: TRESPASS, INTRUDE." Id.

Each of these terms encompasses an act of *competition,* rather than the *regulation* of a district's boundaries by a non-competing supervisory agency, pursuant to state law. The Fifth Circuit has equated "encroachment" with competing franchises, new or additional permit requirements, or similar means." *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The new or additional permit requirements contemplated by the Madison court were imposed by the competing municipality. The competing franchises were granted by the competing municipality. The *Madison* court read Section 1926(b) expansively to also prohibit a condemnation action by a municipality. Id.

The difference between the condemnation action contemplated by the *Madison* court and the deannexation proceedings at issue in this case are distinct and important. A condemnation action is a positive action taken by a competitor, seeking to take existing customers and revenue from the protected rural water association. A state-law proceeding removing territory from a protected association's territory is consistent with Section 1926(b). In the instant case, the administrative body hearing the state-law proceeding did not provide water services in competition with the protected association. This type of regulatory action is distinct from the annexation of territory by a competing association into its own boundaries. *See, e.g., Glenpool Util. Servs. v. Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988)(annexation by competing association), *cert. denied*, 490 U.S. 1067 (1989); *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.) (certification proceedings by competing association), *cert. denied*, 117 S. Ct. 586 (1966); *Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987) (condemnation by competing association); *Rural Water Sys. #1 v. Sioux Center*, 967 F.Supp. 1483 (N.D. Iowa 1997)(annexation by competing association). Accordingly, the court finds post-deannexation water sales by the City to the Expo Center are not prohibited.

In regard to Plaintiff's state and federal antitrust claims, the court finds the City's actions fall within the *Parker* doctrine of state-action immunity. The Tenth Circuit has held that, pursuant to *Parker v. Brown*, 317 U.S. 341 (1943), "[g]enerally, a state's anticompetitive actions are immune from civil antitrust laws." *Buckley Constr. Inc. v. Shawnee Civic.& Cultural Dev. Auth.*, 933 F.2d 853, 855 (10th Cir. 1991). "Under certain circumstances, this immunity also applies to municipalities." Id. To fall within the *Parker* immunity, a municipality must show a state policy to displace competition. *Sterling Beef Co. v. Fort Morgan*, 810 F.2d 961, 963 (10th Cir. 1987).

In *Trigen v. Oklahoma Gas & Electric Co.*, 244 F.3d 1220 (10th Cir. 2001), the Tenth Circuit Court of Appeals determined that Oklahoma Gas & Electric Co. ("OG&E") was protected from federal antitrust scrutiny by the *Parker Doctrine*. "Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from federal antitrust scrutiny." *Trigen v. Oklahoma Gas & Elecuric Co.*, 244 F.3d at 1224. In the instant case, the City's water sales are also the subject of specific statutory regulation and oversight. Okla. Stat. tit. 11, §§ 37-102, 120. Therefore, the court finds summary judgment in favor of the City in accordance with the *Parker* doctrine.

Next, the District argues the City would violate state and federal anti-trust laws if it terminated its water sales to the District because the City is an essential facility. The District has not established an essential facilities claim asainst the City. To prevail on an essential facilities claim, a plaintiff must establish that: (1) the defendant is a monopolist, (2) the facility is essential, (3) the defendant has the type of control over the facility that is forbidden by the Sherman Act, (4) duplication of the facility is unreasonable or impractical, (5) the defendant denied the plaintiff use of the facility, and (6) providing access to the plaintiff was feasible. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984, *aff'd* 472 U.S. 585 (1985); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 752 (S.D. Tex. 1998).

The District cannot establish that the City is a monopolist for purposes of the essential facility doctrine, or that the City has "control" over wholesale water supply in the market area. More, importantly, as a matter of law, the District could duplicate the facility operated by the City, by constructing its own collection and treatment facility[7], or by obtaining water elsewhere. In fact, the District represented to the federal government, on its 1994 loan application, that it had suitable available alternative wholesale water supplies. By requiring water districts to have an available alternative wholesale water supply, the U.S. Department of Agriculture has recognized that wholesale water supplies can be duplicated. 7 C.F.R. §§ 1780.62, 1942.18. For these reasons, the District's claim for injunctive and declaratory relief based on the essential facilities doctrine are rejected as a matter of law.

Finally, although the District alleges in its Second Amended Complaint that Section 1926 (b) would prevent the City from terminating wholesale water sales to a rural water district, this court can find no such prohibition within Section 1926(b). By its express terms, Section 1926(b) does not require suppliers to sell water to any water district. The statute is neither a blanket protection from the problems arising out of business relationships, nor is it a wholesale restriction on vendors or property owners who desire to end their association with the District. *See, e.g., Rural Water and Sewer District No. 4 v. City of Coweta*, No. 96,679, 2002 WL 1067356 (May 2, 2002). Section 1926(b) does not protect the District from all circumstances that could curtail or limit the District's services.

The refusal to sell water to a water district cannot be equated with curtailment of the territory of a rural water district. Section 1926(b) specifically outlines the actions that curtail or limit the services provided by a rural water district;

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[7] Indeed, the District admits plans are in the process to construct its own collection and treatment facility. (Plaintiff's Response at 2).

annexing the rural water district's service area; granting a franchise to some entity other than the rural water district; or regulating the rural water district by requiring the rural water district to obtain a franchise, license, or permit. *See* 7 U.S.C. § 1926(b). Termination of wholesale water sales to the District is not prohibited.

Accordingly, Plaintiff's Motion for Partial Summary Judgment is denied, Defendants' Motion for Partial Summary Judgment is granted.[8]

IT IS SO ORDERED this 7th day of June, 2002.

/s/____________________________
JAMES H. PAYNE
UNITED STATES DISTRICT COURT

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[8] Although the motions before the court are entitled "Partial Motions for Summary Judgment," they encompass all issues in the Second Amended Complaint. Therefore, the court finds this Order disposes of the case in its entirety.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 97-185-P

[Filed June 12, 2002]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,

v.

CITY OF MCALESTER, a municipality, and THE MCALESTERPUBLIC WORKS AUTHORITY, a public trust, et al.,
Defendants.

JUDGMENT

Pursuant to the Plaintiff's Motion for Partial Summary Judgment which was denied and Defendants' Motion for Partial Summary Judgment which was granted the __7__ day of June, 2002, the court enters judgment for the Defendants, CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, et al. And against the plaintiff's PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA.

IT IS SO ORDERED this __12__ day of June, 2002.

/s/____________________________
JAMES H. PAYNE
UNITED STATES DISTRICT JUDGE

APPENDIX F

TITLE 7. AGRICULTURE
CHAPTER 50. AGRICULTURAL CREDIT
REAL ESTATE LOANS

7 U.S.C. § 1926 (2004)

§ 1926. Water and waste facility loans and grants

(a) Criteria; definitions; limitation on allowable uses of Federal funds; inclusion of interest or other income in gross income on sale of insured loan.

(1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents and to furnish financial assistance or other aid in planning projects for such purposes. The Secretary may also make or insure loans to communities that have been designated as rural empowerment zones or rural enterprise communities pursuant to part I of subchapter U of chapter 1 of the Internal Revenue Code of 1986 [26 U.S.C. §§ 1391 et seq.], or as rural enterprise communities

pursuant to section 766 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (Public Law 105-277; 112 Stat. 2681, 2681-37) [unclassified], to provide for the installation or improvement of essential community facilities including necessary related equipment, and to furnish financial assistance or other aid in planning projects for such purposes. The Secretary may also make loans to any borrower to whom a loan has been made under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.), for the conservation, development, use, and control of water, and the installation of drainage or waste disposal facilities, primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1954 [26 U.S.C. §§ 1 et seq.]. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) Water waste disposal, and wastewater facility grants.

(A) Authority.

(i) In general. The Secretary is authorized to make grants to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas.

(ii) Amount. The amount of any grant made under the authority of this subparagraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area.

(iii) Grant rate. The Secretary shall fix the grant rate for each project in conformity with regulations issued by the Secretary that shall provide for a graduated scale of grant rates establishing higher rates for projects in communities that have lower community population and income levels.

(B) Revolving funds for financing water and wastewater projects.

(i) In general. The Secretary may make grants to qualified private, nonprofit entities to capitalize revolving funds for the purpose of providing financing to eligible entities for--

(I) predevelopment costs associated with proposed water and wastewater projects or with existing water and wastewater systems; and

(II) short-term costs incurred for replacement equipment, small-scale extension services, or other small capital projects that are not part of the regular operations and maintenance activities of existing water and wastewater systems.

(ii) Eligible entities. To be eligible to obtain financing from a revolving fund under clause (i), an eligible entity must be eligible to obtain a loan, loan guarantee, or grant under paragraph (1) or this paragraph.

(iii) Maximum amount of financing. The amount of financing made to an eligible entity under this subparagraph shall not exceed--

(I) $100,000 for costs described in clause (i)(I); and

(II) $100,000 for costs described in clause (i)(II).

(iv) Term. The term of financing provided to an eligible entity under this subparagraph shall not exceed 10 years.

(v) Administration. The Secretary shall limit the amount of grant funds that may be used by a grant recipient for administrative costs incurred under this subparagraph.

(vi) Annual report. A nonprofit entity receiving a grant under this subparagraph shall submit to the Secretary an annual report that describes the number and size of communities served and the type of financing provided.

(vii) Authorization of appropriations. There are authorized to be appropriated to carry out this subparagraph $30,000,000 for each of fiscal years 2002 through 2007.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed, (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a comprehensive community water, waste disposal, or other development plan of the rural area.

(4) (A) The term "development cost" means the cost of construction of a facility and the land, easements, and rights-of-way, and water rights necessary to the construction and operation of the facility.

(B) The term "project" shall include facilities providing central service or facilities serving individual properties, or both.

(5) Application requirements. Not earlier than 60 days before a preliminary application is filed for a loan under paragraph (1) or a grant under paragraph (2) for a water or waste disposal purpose, a notice of the intent of the applicant to apply for the loan or grant shall be published in a general circulation newspaper. The selection of engineers for a project design shall be done by a request for proposals by the applicant.

(6) The Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to public bodies or such other agencies as the Secretary may determine having authority to prepare comprehensive plans for the development of water or waste disposal systems in rural areas which do not have funds available for immediate undertaking of the preparation of such plan.

(7) [Deleted]

(8) In each instance where the Secretary receives two or more applications for financial assistance for projects that would serve substantially the same group of residents within a single rural area, and one such application is submitted by a city, town, county or other unit of general local government, he shall, in the absence of substantial reasons to the contrary, provide such assistance to such city, town, county or other unit of general local government.

(9) Conformity with state drinking water standards. No Federal funds shall be made available under this section for a water system unless the Secretary determines that the

water system will make significant progress toward meeting the standards established under title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f et seq.).

(10) Conformity with federal and state water pollution control standards. No Federal funds shall be made available under this section for a water treatment discharge or waste disposal system unless the Secretary determines that the effluent from the system conforms with applicable Federal and State water pollution control standards.

(11) Rural business opportunity grants.

(A) In general. The Secretary may make grants, not to exceed $1,500,000 annually, to public bodies, private nonprofit community development corporations or entities, or such other agencies as the Secretary may select to enable the recipients--

(i) to identify and analyze business opportunities, including opportunities in export markets, that will use local rural economic and human resources;

(ii) to identify, train, and provide technical assistance to existing or prospective rural entrepreneurs and managers;

(iii) to establish business support centers and otherwise assist in the creation of new rural businesses, the development of methods of financing local businesses, and the enhancement of the capacity of local individuals and entities to engage in sound economic activities;

(iv) to conduct regional, community, and local economic development planning and coordination, and leadership development; and(v) to establish centers for training, technology, and trade that will provide training to rural businesses in the utilization of interactive communications technologies to develop international trade opportunities and markets.

(B) Criteria. In awarding the grants, the Secretary shall consider, among other criteria to be established by the Secretary--

(i) the extent to which the applicant provides development services in the rural service area of the applicant; and

(ii) the capability of the applicant to accomplish the activities described in the relevant clauses of subparagraph (A).

(C) Coordination. The Secretary shall ensure, to the maximum extent practicable, that assistance provided under this paragraph is coordinated with and delivered in cooperation with similar services or assistance provided to rural residents by the Cooperative State Research, Education, and Extension Service or other Federal agencies.

(D) Authorization of appropriations. There are authorized to be appropriated to carry out this paragraph $15,000,000 for each of fiscal years 1996 through 2007.

(12)

(A) The Secretary shall, in cooperation with institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307, and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, establish a system for the dissemination of information and technical assistance on federally sponsored or funded programs. The system shall be for the use of institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C.

301-305, 307, and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, and other persons concerned with rural development.

(B) The informational system developed under this paragraph shall contain all pertinent information, including, but not limited to, information contained in the Federal Procurement Data System, Federal Assistance Program Retrieval System, Catalogue of Federal Domestic Assistance, Geographic Distribution of Federal Funds, United States Census, and Code of Federal Regulations.

(C) The Secretary shall obtain from all other Federal departments and agencies comprehensive, relevant, and applicable information on programs under their jurisdiction that are operated in rural areas.

(D) Of the sums authorized to be appropriated to carry out the provisions of this title, not more than $1,000,000 per year may be expended to carry out the provisions of this paragraph.

(13) In the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group) in a rural community having a population not in excess of five thousand five hundred and which, in the case of water facility loans, has a community water supply system, where the Secretary determines that due to unanticipated diminution or deterioration of its water supply, immediate action is needed, or in the case of waste disposal, has a community waste disposal system, where the Secretary determines

that due to unanticipated occurrences the system is not adequate to the needs of the community. The Secretary shall utilize the Soil Conservation Service in rendering technical assistance to applicants under this paragraph to the extent he deems appropriate.

(14) Rural water and wastewater technical assistance and training programs.

(A) In general. The Secretary may make grants to private nonprofit organizations for the purpose of enabling them to provide to associations described in paragraph (1) of this subsection technical assistance and training to--

(i) identify, and evaluate alternative solutions to, problems relating to the obtaining, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas;

(ii) prepare applications to receive financial assistance for any purpose specified in paragraph (2) of this subsection from any public or private source; and

(iii) improve the operation and maintenance practices at any existing works for the storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas.

(B) Selection priority. In selecting recipients of grants to be made under subparagraph (A), the Secretary shall give priority to private nonprofit organizations that have experience in providing the technical assistance and training described in subparagraph (A) to associations serving rural areas in which residents have low income and in which water supply systems or waste facilities are unhealthful.

(C) Funding. Not less than 1 nor more than 3 percent of any funds appropriated to carry out paragraph (2) of this subsection for any fiscal year shall be reserved for grants under subparagraph (A) unless the applications, qualifying for grants, received by the Secretary from eligible nonprofit organizations for the fiscal year total less than 1 per centum of those funds.

(15) In the case of water and waste disposal facility projects serving more than one separate rural community, the Secretary shall use the median population level and the community income level of all the separate communities to be served in applying the standards specified in paragraph (2) of this subsection and section 307(a)(3)(A) [7 U.S.C. § 1927(a)(3)(A)].

(16) Grants under paragraph (2) of this subsection may be used to pay the local share requirements of another Federal grant-in-aid program to the extent permitted under the law providing for such grant-in-aid program.

(17) (A) In the approval and administration of a loan made under paragraph (1) for a water or waste disposal facility, the Secretary shall consider fully any recommendation made by the loan applicant or borrower concerning the technical design and choice of materials to be used for such facility.

(B) If the Secretary determines that a design or materials, other than those that were recommended, should be used in the water or waste disposal facility, the Secretary shall provide such applicant or borrower with a comprehensive justification for such determination.

(18) In making or insuring loans or making grants under this subsection, the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this title.

(19) Community facilities grant program.

(A) In general. The Secretary may make grants, in a total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, Indian tribes (as such term is defined under section 4(e) of Public Law 93-638 [25 U.S.C. § 450b(e)], as amended),[,] and federally recognized Indian tribes to provide the Federal share of the cost of developing specific essential community facilities in rural areas.

(B) Federal share.

(i) In general. Except as provided in clauses (ii) and (iii), the Secretary shall, by regulation, establish the amount of the Federal share of the cost of the facility under this paragraph.

(ii) Maximum amount. The amount of a grant provided under this paragraph for a facility shall not exceed 75 percent of the cost of developing the facility.

(iii) Graduated scale. The Secretary shall provide for a graduated scale for the amount of the Federal share provided under this paragraph, with higher Federal shares for facilities in communities that have lower community population and income levels, as determined by the Secretary.

(C) Reservation of funds for child day care facilities.

(i) In general. For each fiscal year, not less than 10 percent of the funds made available to carry out this paragraph shall be reserved for grants to pay the Federal share of the cost of developing and constructing day care facilities for children in rural areas.

(ii) Release. Funds reserved under clause (i) for a fiscal year shall be reserved only until April 1 of the fiscal year.

(20) Community facilities grant program for rural communities with extreme unemployment and severe economic depression.

(A) Definition of not employed rate. In this paragraph, the term "not employed rate", with respect to a community, means the percentage of individuals over the age of 18 who reside within the community and who are ready, willing, and able to be employed but are unable to find employment, as determined by the department of labor of the State in which the community is located.

(B) Grant authority. The Secretary may make grants to associations, units of general local government, nonprofit corporations, and Indian tribes (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b)) in a State to provide the Federal share of the cost of developing specific essential community facilities in rural communities with respect to which the not employed rate is greater than the lesser of--

(i) 500 percent of the average national unemployment rate on the date of the enactment of this paragraph [enacted Nov. 9, 2000], as determined by the Bureau of Labor Statistics; or

(ii) 200 percent of the average national unemployment rate during the Great Depression, as determined by the Bureau of Labor Statistics.

(C) Federal share. Paragraph (19)(B) shall apply to a grant made under this paragraph.

(D) Authorization of appropriations. There are authorized to be appropriated to carry out this paragraph $50,000,000 for fiscal year 2001 and such sums as are necessary for each subsequent fiscal year, of which not more than 5 percent of the amount made available for a fiscal year shall be available for community planning and implementation.

(E) Rural broadband. Notwithstanding subparagraph (C), the Secretary may make grants to state agencies for use by regulatory commissions in states with rural communities without local dial-up Internet access or broadband service to establish a competitively, technologically neutral grant program to telecommunications carriers or cable operators that establish common carrier facilities and services which, in the commission's determination, will result in the long-term availability to such communities of affordable broadband services which are used for the provision of high speed Internet access.

(21) Community facilities grant program for rural communities with high levels of out-migration or loss of population.

(A) Grant authority. The Secretary may make grants to associations, units of general local government, nonprofit corporations, and Indian tribes (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b)) in a State to provide the Federal share of the cost of developing specific essential community facilities in any geographic area--

(i) that is represented by--

(I) any political subdivision of a State;

(II) an Indian tribe on a Federal or State reservation; or

(III) other federally recognized Indian tribal group;

(ii) that is located in a rural area (as defined in section 381A [7 U.S.C. § 2009]);

(iii) with respect to which, during the most recent 5-year period, the net out-migration of inhabitants, or other population loss, from the area equals or exceeds 5 percent of the population of the area; and

(iv) that has a median household income that is less than the nonmetropolitan median household income of the United States.

(B) Federal share. Paragraph (19)(B) shall apply to a grant made under this paragraph.

(C) Authorization of appropriations. There are authorized to be appropriated to carry out this paragraph $50,000,000 for fiscal year 2001 and such sums as are necessary for each subsequent fiscal year, of which not more than 5 percent of the amount made available for a fiscal year shall be available for community planning and implementation.

(22) Rural water and wastewater circuit rider program.

(A) In general. The Secretary shall establish a national rural water and wastewater circuit rider program that is based on the rural water circuit rider program of the National Rural Water Association that (as of the date of enactment of this paragraph) receives funding from the Secretary, acting through the Rural Utilities Service.

(B) Relationship to existing program. The program established under subparagraph (A) shall not affect the authority of the Secretary to carry out the circuit rider program for which funds are made available under the heading "rural community advancement program" in title III of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002 (115 Stat. 719).

(C) Authorization of appropriations. There is authorized to be appropriated to carry out this paragraph $15,000,000 for fiscal year 2003 and each fiscal year thereafter.

(23) Multijurisdictional regional planning organizations.

(A) Grants. The Secretary shall provide grants to multijurisdictional regional planning and development organizations to pay the Federal share of the cost of providing assistance to local governments to improve the infrastructure, services, and business development capabilities of local governments and local economic development organizations.

(B) Priority. In determining which organizations will receive a grant under this paragraph, the Secretary shall give priority to an organization that--

(i) serves a rural area that, during the most recent 5-year period--

(I) had a net out-migration of inhabitants, or other population loss, from the rural area that equals or exceeds 5 percent of the population of the rural area; or

(II) had a median household income that is less than the nonmetropolitan median household income of the applicable State; and

(ii) has a history of providing substantive assistance to local governments and economic development organizations.

(C) Federal share. A grant provided under this paragraph shall be for not more than 75 percent of the cost of providing assistance described in subparagraph (A).

(D) Maximum amount of grants. The amount of a grant provided to an organization under this paragraph shall not exceed $100,000.

(E) Authorization of appropriations. There is authorized to be appropriated to carry out this paragraph $30,000,000 for each of fiscal years 2003 through 2007.

(24) Loan guarantees for water, wastewater, and essential community facilities loans.

(A) In general. The Secretary may guarantee a loan made to finance a community facility or water or waste facility project in a rural area, including a loan financed by the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986 [26 U.S.C. § 142(a)].

(B) Requirements. To be eligible for a loan guarantee under subparagraph (A), an individual or entity offering to purchase the loan shall demonstrate to the Secretary that the person has--

(i) the capabilities and resources necessary to service the loan in a manner that ensures the continued performance of the loan, as determined by the Secretary; and

(ii) the ability to generate capital to provide borrowers of the loan with the additional credit necessary to properly service the loan.

(25) Tribal college and university essential community facilities.

(A) In general. The Secretary may make grants to tribal colleges and universities (as defined in section 316 of the Higher Education Act of 1965 (20 U.S.C. 1059c)) to provide the Federal share of the cost of developing specific tribal college or university essential community facilities in rural areas.

(B) Federal share.

(i) In general. Except as provided in clauses (ii) and (iii), the Secretary shall, by regulation, establish the maximum percentage of the cost of the facility that may be covered by a grant under this paragraph.

(ii) Maximum amount. The amount of a grant provided under this paragraph for a facility shall not exceed 75 percent of the cost of developing the facility.

(iii) Graduated scale. The Secretary shall provide for a graduated scale of the percentages of the cost covered by a grant made under this paragraph that provides higher percentages for facilities in communities that have lower community population and income levels, as determined by the Secretary.

(C) Authorization of appropriations. There is authorized to be appropriated to carry out this paragraph $10,000,000 for each of fiscal years 2003 through 2007.

(b) Curtailment or limitation of service prohibited. The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(c) [Repealed]

(d) Carryover of unused authorizations for appropriations. Any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Filed Thursday, January 21, 1999]

THE CLERK IS DIRECT TO ISSUE THE FOLLOWING ORDERS:

* * * * *

90,114 Pittsburgh County Rural Water District No. 7, an agency and legally constituted authority of the State of Oklahoma v. City of McAlister, a municipality and the McAlister Public Works Authority, a public trust, The Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Bill Webber, Oben Weeks et al.

Certiorari denied

CONCUR: Summers, C.J., Hargrave, V.C.J., Lavender, Simms, Wilson, Kauger, Watt, JJ.

Dissent: Opala, J.

NOT VOTING: Hodges, J.

* * * * *

/s/______________________________
Vice Chief Judge

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 4

[Filed October 13, 1998]

* * * * *

THE CLERK IS DIRECT TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

90,114 Pittsburgh County Rural Water District No. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Appellant, v. CITY OF McALESTER, a municipality, and THE McALESTER PUBLIC WORKS AUTHORITY, a public trust, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURGH, H.G. GILLIAM, BILL WEBBER, and OBEN WEEKS, Appellees, and KENNETH W. SHERRILL, LINDA F. SHERRILL, BAR-19, BLESSING CORP. d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURGH COUNTY REGIONAL EXPOSITION AUTHORITY, and THUNDERCREEK GOLF COURSE TRUST AUTHORITY, Additional Defendants.

Petition for Rehearing of Appellant is DENIED

* * * * *

Done in conference this 9th day of October, 1998.

/s/______________________________
Ronald J. Stubblefield
Presiding Judge
Division 4

IN THE COURT OF CIVIL APPEALS STATE OF OKLAHOMA

DIVISION 4

Filed September 8, 1998
James W. Patterson, Clerk

PITTSBURG COUNTY RURAL WATER)
DISTRICT NO. 7, an agency and legally)
constituted authority of the STATE OF)
OKLAHOMA,)
)
Appellant,)
)
vs.)
)
CITY OF McALESTER, a municipality,)
and THE McALESTER PUBLIC WORKS)
AUTHORITY, a public trust, THE)
BOARD OF COUNTY)
COMMISSIONERS OF THE)
COUNTY OF PITTSBURG, H.G.)
GILLIAM, BILL WEBBER, and OBEN)
WEEKS,)
)
Appellees,)
)
and)
)
KENNETH W. SHERRILL, LINDA F.)
SHERRILL, BAR-19, BLESSING CORP.)
d/b/a EDISON PLASTICS, MIG, INC.)
SOUTHWEST OKLAHOMA BOX)

COMPANY, TRI-CAT, INC., SIMMONS)
POULTRY FARMS, INC., DENNIS)
DEFRANGE, TERRY KINYON,)
PITTSBURG COUNTY REGIONAL)
EXPOSITION AUTHORITY, and)
THUNDERCREEK GOLF COURSE)
TRUST AUTHORITY,)
)
Additional Defendants.)
______________________________)

APPEAL FROM THE DISTRICT COURT
OF PITTSBURG COUNTY, OKLAHOMA

Honorable Thomas M. Bartheld, Trial Judge

Steven M. Harris Michael D. Davis Doyle & Harris Tulsa, Oklahoma	For Appellant
Wesley Brown Brown & Brown McAlester, Oklahoma	
Linda C. Martin James C. Milton Doerner, Saunders, Daniel & Anderson Tulsa, Oklahoma	For Appellees City of McAlester and McAlester Public Works Authority
Christopher J. Wilson Assistant District Attorney McAlester, Oklahoma	For Appellees Board of County Commissioners, Gilliam, Webber, and Weeks

OPINION ON REHEARING

REIF, J.

Pittsburg County Rural Water District No. 7 appeals the dismissal of its suit challenging the decision of the Board of County Commissioners of Pittsburg County to release lands from the water district. The suit was filed as a statutory appeal from a decision by a board of county commissioners and contained an alternative request for declaratory judgment that the release of lands was contrary to federal law. Upon review, we hold that (1) the county commissioners' decision to release lands from the water district is appealable pursuant to 19 O.S.1991 §§ 431 through 435; (2) such appeal was the water district's exclusive remedy for judicial review of any legal errors by the county commissioners, including errors in applying federal law; and (3) the appeal was properly dismissed.

The board of county commissioners of the county in which a rural water district is located is authorized to release lands from the rural water district pursuant to 82 0.S.1991 § 1324.21. This statute provides that "fifty-one percent (51%) of the affected landowners or the board of directors [of the district] may petition the county commissioners to release those lands from the district." The petition must describe the lands affected. Notice must be given, as provided in 82 0.S.1991 § 1324.5, of the filing of the petition for release of lands and fixing the time and place of hearing. If the board of county commissioners finds that granting the petition is in the best interests of the affected landowners and the district, the board shall issue a certificate stating that the involved lands are released and separated from the district. Full minutes of the hearing shall be entered in the journal of the board of county commissioners.

The procedure to secure the release of lands from a water district has features commonly associated with a judicial proceeding -- petition, notice, hearing, a record, and a standard for decision making. Additionally, the power to decide whether lands should be released from a water district is vested in a neutral tribunal -- the board of county commissioners, as opposed to being vested in the corporate body of the water district, as in the case of municipal detachment. See 11 0.S.1991 § 21-110. As a neutral tribunal whose decision affects the legal relation of particular lands vis-a-vis a corporate body, the board of county commissioners acts in a judicial or quasi-judicial capacity,[1] whereas a corporate body's decision to detach territory from its corporate limits is normally a legislative decision. See Matter of De-annexation of Certain Real Property, 1983 OK 44, 662 P.2d 1375.

It is well settled that "an appeal lies from an order of the Board of County Commissioners to the District Court whenever their orders or decisions are of a judicial or quasi judicial nature." Chandler Materials Co. v. Board of County Commissioners of Tulsa County, 254 P.2d 767, 770 (Okla. 1953). "An appeal . . . from the judgment of the county commissioners to the district court . . . constitutes an adequate legal remedy in favor of any aggrieved party resident of the county." Yard v. Board of County

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[1] "'Judicial power' is authority to hear and determine, where the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication; and a 'judicial' act involves the exercise of judgment or discretion." Ward v. Board of County Commissioners of Okfuskee Co., 114 Okla. 246, 246 P. 376, 378 (1926) (citing In re courthouse of Okmulgee Co., 58 Okla. 683, 161 P. 200 (1916)).

Commissioners of Okfuskee Co., 114 Okla. 246, 246 P. 376, 378-79 (1926) (citing Board of County Commissioners of Sequoyah County v. McGowan, 104 Okla. 283, 231 P. 258 (1924)). In Ward, the court held: "No appeal having been taken from the findings of the board of county commissioners on [a] particular question [for the board to decide], in our judgment such findings of the board of county commissioners on this point, in the absence of fraud or collusion, cannot be attacked in a collateral proceeding." 246 P. at 378. Additionally, the statutory appeal is the exclusive remedy and resort can not be had to an equitable remedy. Lowrimore v. Board of County Commissioners, 113 Okla. 109, 239 P. 454, 455 (1925).

In the case below, Pittsburg County Rural Water District No. 7 did not timely comply with the statutory requirements to bring an appeal from the decision of the Board of County Commissioners releasing lands from the water district. That decision is final and binding on the water district even if based on an erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief. Accordingly, the trial court's dismissal is affirmed.

AFFIRMED.

STUBBLEFIELD, P.J., and RAPP, J., concur.

September 8, 1998

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 4

[Filed August 17, 1998]

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

90,114 PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Appellant, v. CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURG, H.G. GILLIAM, BILL WEBBER, AND OBEN WEEKS, Appellees, and KENNETH W. SHERRILL, LINDA F. SHERRILL, BAR-19, BLESSING CORP. d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, and THUNDERCREEK GOLF COURSE TRUST AUTHORITY, Additional Defendants.

Petition for Rehearing of Appellees is GRANTED.
Opinion of May 19, 1998, is withdrawn.
RAPP, J., dissents.

Done in conference this 14th day of August, 1998.

/s/______________________________
RONALD J. STUBBLEFIELD
Presiding Judge
Division 4

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 4

Case No. 90,114

[Filed May 19, 1998]

PITTSBURG COUNTY RURAL)
WATER DISTRICT NO. 7, an agency and)
legally constituted authority of the)
STATE OF OKLAHOMA,)
Appellant,)
)
vs.)
)
CITY OF MCALESTER, a municipality,)
and THE MCALESTER PUBLIC WORKS)
AUTHORITY, a public trust, THE)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF PITTSBURG, H.G. GILLIAM,)
BILL WEBBER, and)
OBENWEEKS,)
Appellees,)
)
and)
)
KENNETH W. SHERRILL, LINDA F. SHERRILL,)
BAR-19, BLESSING CORP. d/b/a EDISON)
PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA)
BOX COMPANY, TRI-CAT, INC.,)
SIMMONS POULTRY FARMS, INC.,)
DENNIS DEFRANGE, TERRY KINYON,)
PITTSBURG COUNTY REGIONAL)
EXPOSITION AUTHORITY, and)

THUNDERCREEK GOLF COURSE TRUST)
AUTHORITY,)
Additional Defendants.)
_______________________________________)

APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY, OKLAHOMA

Honorable Thomas M. Bartheld, Trial Judge

Steven M. Harris Michael D. Davis Doyle & Harris Tulsa, Oklahoma	For Appellant
Wesley Brown Brown & Brown McAlester, Oklahoma	
Linda C. Martin James C. Milton Doerner, Saunders, Daniel & Anderson Tulsa, Oklahoma	For Appellees City of McAlester and McAlester Public Works Authority
Christopher J. Wilson Assistant District Attorney McAlester, Oklahoma	For Appellees Board of County Commissioners of the County of Pittsburg, H.G. Gilliam Bill Webber, and Oben Weeks

MEMORANDUM OPINION

RAPP, J.

Trial court plaintiff, Pittsburg County Rural Water District No. 7 (Pitt-7), appeals the trial court's dismissal of its appeal of a deannexation decision by defendant, the Pittsburg County Board of Commissioners (Commissioners), and the dismissal of its request for declaratory relief.

I. FACTS

The genesis of theaction is a dispute between Pitt-7 and the City of McAlester over the sale of water to area landowners. Several landowners requested the County Commissioners deannex their properties from Pitt-7. Following a hearing, the Commissioners granted the requests.

Pitt-7 then filed a "Petition in Error Appealing Decision of the Board of County Commissioners and/or Petition for Declaratory Judgment." The petition appealed the deannexation decision and, alternatively, sought a declaratory judgment that the Commissioners' actions were void and violative of federal law.[1]

Defendants Commissioners, the City of McAlester, and the McAlester Public Works Authority filed special appearances and motions to dismiss. The motions were based on 19 O.S.1991 §§ 431 and 432, which concern appeals from decisions of boards of commissioners. Essentially, the defendants asserted Pitt-7 failed to follow statutory procedures as to timeliness of appeal, service, and the filing of a bond. Pitt-7 filed a response, asserting it had followed the statutory requirements, and further asserting that even if its appeal from the Commissioners', decision was invalid, it nevertheless could pursue its declaratory judgment action.

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[1] The record indicates Pitt-7 filed a related action in federal court apparently based in part on its indebtedness to the federal government for loans under 7 U.S.C. § 1926(b). This action is not part of the record before us. Accordingly, we did not correlate the federal action with this decision.

After a hearing, the trial court dismissed Pitt-7's lawsuit, specifically findingthat service on an assistant district attorney was not sufficient and that Pitt-7 had failed to perfect its appeal under the statutes. It concluded, "[t]his Court has no jurisdiction in this matter." Pitt-7 appeals.

II. ANALYSIS

Our review of the trial court's grant of a motion to dismiss is de novo and involves consideration of whether a plaintiff's petition is legally sufficient. Gay v. Akin, 1988 OK 150, n.13, 766 P.2d 985. Where, as here, the parties presented matters outside the pleadings which were not excluded by the court, a motion to dismiss is treated as a motion for summary judgment. Meadows v. Fain, 1989 OK 100, ¶ 8, 776 P.2d 1270. Therefore, the trial court's decision will be affirmed only if the record shows that there is no issue of material fact and one party is entitled to judgment as a matter of law. Id. at ¶ 9, 776 P.2d at 1272.

A review of the record and applicable law reveals the trial court correctly determined it had no jurisdiction to hear Pitt-7's appeal, but not for the reasons stated. A local legislative body's order determining land use is a legislative function, not a judicial function. Garrett v. City of Oklahoma City, 1978 OK CIV APP 54, 590 P.2d 1195. "[Title] 19 O.S.[1991] § 431 does not authorize an appeal to the district court from actions involving a legislative function by a board of county commissioners." Gregory v. Board of County Comm'rs of Rogers County, 1973 OK 101, ¶ 19, 514 P.2d 667, 670. Though Garrett and Gregory involve zoning decisions by a board, there is no reason to distinguish them from the deannexation decision at issue here. That decision clearly determines land use and is a legislative function. It therefore follows that the trial court was without jurisdiction to hear Pitt-7's appeal.

However, Gregory goes on to hold that "[T]his does not mean, however, that a person prejudicially affected by the order of a board of county commissioners, changing or denying a change in a zoning regulation, is not entitled to seek judicial relief from such order." Id. at ¶ 20, 514 P.2d at 670-71. Gregory then lists several other methods of available relief by way of mandamus and injunction. Under Gregory, therefore, Pitt-7 is entitled to pursue its claim for judicial relief. Its attempt to obtain declaratory relief is separate from its attempt to appeal the Commissioners' decision and is not subject to Title 19's requirements. Instead, that attempt is subject to the same limitation period as any other petition for declaratory relief. In that regard, Pitt-7's petition was unquestionably timely filed.

Therefore, we hold that while the trial court correctly dismissed Pitt-7's appeal from the Commissioners' order, it erred by dismissing Pitt-7's claim for declaratory relief. As to the latter claim, this cause is reversed and remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STUBBLEFIELD, P.J., concurs, and REIF, J., dissents.

May 19, 1998

REIF, J., dissenting

This appeal concerns the manner in which an aggrieved party can obtain judicial review of a decision by a board of county commissioners to release lands from a rural water district. Review of the statutory procedure for release of lands from a water district indicates that the decision is a judicial or quasi-judicial decision which must be appealed pursuant to 19 O.S.1991 §§ 431 through 435.

The board of county commissioners of the county in which a rural water district is located is authorized to release lands from the rural water district pursuant to 82 O.S.1991 § 1324.21. This statute provides that "fifty-one percent (51%) of the affected landowners or the board of directors [of the district] may petition the county commissioners to release those lands from the district." The petition must describe the lands affected. Notice must be given, as provided in 82 O.S.1991 § 1324.5, of the filing of the petition for release of lands and fixing the time and place of hearing. If the board of county commissioners finds that granting the petition is in the best interests of the affected landowners and the district, the board shall issue a certificate stating that the involved lands are released and separated from the district. Full minutes of the hearing shall be entered in the journal of the board of county commissioners.

The procedure to secure the release lands from a water district has features commonly associated with a judicial proceeding -- petition, notice, hearing, a record, and a standard for decision making. Additionally, the power to decide whether lands should be released from a water district is vested in a neutral tribunal -- the board of county commissioners, as opposed to being vested in the corporate body of the water district, as in the case of municipal detachment, See 11 O.S.1991 § 21-110. As a neutral tribunal whose decision affects the legal relation of particular lands vis-a-vis a corporate body, the board of county commissioners acts in a judicial or quasi-judicial capacity,[2] whereas a corporate body's decision to detach territory from its corporate limits is normally a legislative decision. See Matter of De-annexation of Certain Real Property, 1983 OK 44, 662 P.2d 1375.

It is well settled that "an appeal lies from an order of the Board of County Commissioners to the District Court whenever their orders or decisions are of a judicial or quasi judicial nature." Chandler Materials Co. v. Board of County Commissioners of Tulsa County, 254 P.2d 767, 770 (Okla. 1953). "An appeal . . . from the judgment of the county commissioners to the district court . . . constitutes an adequate legal remedy in favor of any aggrieved party resident of the county." Ward v. Board of County Commissioners of Okfuskee Co., 114 Okla. 246, 246 P. 376, 378-79 (1926) (citing Board of County Commissioners of Sequoyah County v. McGowan, 104 Okla. 283, 231 P. 258 (1924)). In Ward, the court held: "No appeal having been taken from the findings of the board of county commissioners on [a] particular question [for the board to decide], in our judgment such findings of the board of county commissioners on this point, in the absence of fraud or collusion, cannot be attacked in a collateral proceeding." 246 P. at 378. Additionally, the statutory appeal is the exclusive remedy and resort can not be had to an equitable remedy. Lowrimore v. Board of County Commissioners, 113 Okla. 109, 239 P. 454, 455 (1925).

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[2] "'Judicial power' is authority to hear and determine, where the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication; and a 'judicial' act involves the exercise of judgment or discretion." Ward v. Board of County Commissioners of Okfuskee Co., 114 Okla. 246, 246 P. 376, 378 (1926) (citing In re Courthouse of Okmulgee Co., 58 Okla. 683, 161 P. 200 (1916)).

In the case below, Pittsburg County Rural Water District No. 7 did not timely comply with the statutory requirements to bring an appeal from the decision of the Board of County Commissioners releasing lands from the water district. That decision is final and binding on the water district. It is not subject to collateral attack or an equitable challenge. The trial court's dismissal should be affirmed in toto.

OKLAHOMA DISTRICT COURT
IN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

No. C-97-825

[Filed September 15, 1997]

PITTSBURG COUNTY RURAL WATER
DISTRICT NO. 7, an agency and legally
constituted authority of the STATE OF OKLAHOMA.
Plaintiff/Appellant,
vs.

CITY OF McALESTER, a municipality,
and THE McALESTER PUBLIC WORKS
AUTHORITY, a public trust,
Defendants/Appellees,

KENNETH W. SHERRILL, LINDA F.SHERILL,
CITY OF McALESTER,BAR-19, BLESSING
CORP. d/b/a EDISON PLASTICS,
MIG, INC. ,SOUTHWEST OKLAHOMA
COX COMPANY, TRI-CAT, INC.,
SIMMONS POULTRY FARMS, INC.,
DENNIS DEFRANGE, TERRY KINYON,
PITTSBURG COUNTY REGIONAL
EXPOSITION AUTHORITY,
THE BOARD OR COUNTY COMMISSIONERS OF
THE COUNTY OF PITTSBURG, H.G. GILLIAM,
BILL WEBBER, OBEN WEEKS, and
THUNDERCREEK GOLF COURSE TRUST
AUTHORITY,
Additional Defendants/Appellees.

ORDER

This matter comes on this 4th day of September, 1997, before the undersigned Judge of the District Court of Pittsburg County, Oklahoma, upon the Special Appearances and Motions To Dismiss filed by the City of McAlester; Board of County Commissioners of the County of Pittsburg, H.A. Gilliam, Bill Webber, and Oben Weeks; MIG, Inc., and Pittsburg County Regional Exposition Authority.

The Movants were represented, respectively, by Wesley Brown, City Attorney; Chris Wilson, First Assistant District Attorney, in and for the 18th District, State of Oklahoma; and Don Hackler. The Respondent was represented by Michael D. Davis of the firm Doyle and Harris.

The Court being advised in the premises, having reviewed the files and pleadings herein, and having heard the argument of counsel FINDS, ORDERS and DECREES:

1. That the Court finds that the specific statutes, Title 19 Sec. 431, et seq., are applicable to the matter in controversy and such statutes prescribe the rules and procedures to be followed in an appeal from a decision of the Board of County Commissioners.

2. That service on Chris Wilson, Assistant District Attorney is not sufficient service or notice as therein prescribed.

3. That an appeal from the Board of County Commissioners has not been perfected within the dictates of Title 19 Sec. 431, et seq. of the Oklahoma Statutes.

4. This Court has no jurisdiction in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiff's PETITION IN ERROR APPEALING DECISION OF BOARD OF COUNTY COMMISSIONERS AND/OR PETITION FOR DECLARATORY JUDGMENT is DISMISSED.

DATED this 15th day of September, 1997.

Original Signed by Thomas M. Bartheld
Honorable Thomas M. Bartheld
Judge of the District Court

Prepared and Submitted by:

/s/
Wesley Brown, OBA #1207
Brown & Brown
P.O. Box 1542
McAlester, OK 74502
(918) 423-4606
Attorney For City of McAlester

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLAHOMA

[Filed July 7, 1997]

IN THE MATTER OF PETITION TO RELEASE
LANDS FROM RURAL WATER DISTRICT
NO. 7, PITTSBURG COUNTY, OKLAHOMA

CITY OF MCALESTER, BAR-19, BLESSING
CORP d/b/a EDISON PLASTICS, MIG, INC.,
SOUTHEAST OKLAHOMA BOX COMPANY,
TRI-CAT, INC., SIMMONS POULTRY FARMS,
INC., DENNIS DEFRANGE, AND TERRY KINYON.
Petitioners.

CERTIFICATE RELEASING LANDS FROM RURAL WATER DISTRICT No. 7, PIITSBURG COUNTY, OKLAHOMA

This matter comes on for hearing on the Petition to Release Lands from Rural Water District No. 7, Pittsburg County, Oklahoma, on this 23rd day of June, 1997, by Petition filed by the City of McAlester, Bar-19, Blessing Corp d/b/a Edison Plastics, Mig, Inc., Southeast Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis DeFrange and Terry Kinyon, filed with the County Clerk of said county on the 12th day of May, 1997.

The Board of County Commissioners, having considered the Petition filed herein and having heard statements of counsel for said Petitioners and all present, finds:

1. That proper notice of the time and place of the hearing has been given as required by 82 Okl. Stat. Sec. 1324.21; that the County Clerk on the 19th day of May 1997, by Certified Mall, mailed to the Chairman of the Board of Directors of Rural Water District No. 7, Pittsburg County, Oklahoma, a Notice of Hearing for Release of Lands from Rural Water District No. 7, a copy of the aforesaid Notice being attached hereto and made a part hereof; that on the 20th and 27th days of May, 1997, the County Clerk caused a Notice of Hearing to be published for two (2) consecutive weeks in the McAlester News Capital and Democrat; a newspaper of general circulation in Pittsburg County, Oklahoma, located in McAlester, Oklahoma, and the County Clerk has duly filed with this Board her Proof of Mailing Notice and Publication of Hearing, together with the Publisher's Affidavit of Publication.

2. That it is in the best interest of all the landowners with the area to be released and Rural Water District No. 7, that such lands be released from Rural Water District No. 7, Pittsburg County, Oklahoma, to better provide water service both for economic development and rural residential customers for all affected parties, and it is not within Water District No. 7's financial and physical capabilities to supply water to the petitioned area.

IT IS THEREFORE ORDERED, DECLARED AND CERTIFIED by the Board of County Commissioners of Pittsburg County, Oklahoma, that the following described lands are hereby released and separated from Rural Water District No. 7, Pittsburg County, Oklahoma, said lands being known as Steven W. Taylor Industrial Park, and more particularly described as-follows:

SEE SCHEDULE "A"

IT IS FURTHER ORDERED that the County Clerk enter the foregoing findings, decisions and orders upon the records of this Board and that the Secretary of said Rural Water District be notified of this action within thirty (30) days hereof.

Dated this 16th day of June, 1997.

BOARD OF COUNTY COMMISSIONERS PITTSBURG COUNTY; OKLAHOMA

/s/____________________________
Bill Webber, Chairman

/s/____________________________
Oben Weeks

/s/____________________________
H.A. Gilliam

*** Schedule A omitted for purposes of this Appendix***

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF PITTSBURG COUNTY, OKLAHOMA

[Filed June 27, 1997]

IN THE MATTER OF PETITION TO
RELEASE LANDS FROM RURAL WATER
DISTRICT NO.7, PITTSBURG COUNTY,
OKLAHOMA, SUBMITTED BY
PITTSBURG COUNTY REGIONAL
EXPOSITION AUTHORITY, a public
trust.

CERTIFICATE RELEASING LANDS FROM RURAL WATER DISTRICT NO. 7, PITTSBURG COUNTY, OKLAHOMA

This matter comes on for hearing on the Petition to release lands from Rural Water District No. 7, Pittsburg County, Oklahoma, on this 23rd day of June, 1997, by petition filed by the Pittshurg County Regional Exposition Authority, a public trust, with the County Clerk on the 15th day of May, 1997.

The Board of County Commissioners, having considered the Petition filed herein and having heard statements of counsel for said Petitioners, and all present, finds:

1. That proper notice of the time and place of the hearing has been given as required by 82 OKL. STAT. SEC. 1324.21; that the County Clerk on the 19th day of May, 1997, by certified mail, mailed to the Chairman of the board of Directors of Rural Water District No. 7, Pittsburg County, Oklahoma, a Notice of Hearing; that the County Clerk on the

20th and 27th days of May, 1997, the County Clerk caused said Notice of Hearing to be published for two consecutive weeks in the McAlester News-Capital and Democrat, a newspaper of general circulation in Pittsburg County, Oklahoma, located in McAlester, Oklahoma, and the County Clerk has duly filed with this Board her Proof of Mailing Notice and Publication of Hearing, together with the Publisher's Affidavit of Publication.

2. That it is in the best interest of the landowner, and in the best interest of Rural Water District No. 7, that such lands be released from Rural Water District No. 7, Pittsburg County, Oklahoma.

IT IS THEREFORE ORDERED, DECLARED AND CERTIFIED by the Board of County Commissioners of Pittsburg County, Oklahoma, that the following described lands are hereby released and separated from Rural Water District No. 7, Pittsburg County, Oklahoma, said lands being more particularly described as follows:

*** Legal Description Omitted for Purposes
of this Appendix***

provided that Pittsburg County Rural Water District No. 7 is permitted to maintain its present service to the four exhibit buildings and restrooms for a period of ten years from this date.

IT IS FURTHER ORDERED that the County Clerk enter the foregoing findings, decisions and orders upon the records of this Board and that Secretary of said Rural Water District No. 7 be notified of this action within 30 days hereof.

Dated this 23rd day of June, 1997.

BOARD OF COUNTY COMMISSIONERS, PITTSBURG COUNTY, OKLAHOMA

/s/______________________________
Bill Webber, Chairman

/s/______________________________
Oben Weeks

/s/______________________________
H.A. Gilliam